United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

182

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,571

TELEPHONE USERS ASSN., INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT WITH APPENDIX

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QUESTIONS PRESENTED

1.

WHETHER PUBLIC SERVICE COMMISSION ORDERS GRANTING RATE INCREASES OF $2,368,000. PER ANNUM ARE VOID (OR VOIDABLE) ON THE GROUNDS THAT THE CHAIRMAN OF SAID COMMISSION, WHO VOTED FOR THE INCREASE, HAD THREE CHILDREN,INCLUDING TWO MINORS RESIDING IN HIS HOUSEHOLD, ON THE PAYROLL OF THE TELEPHONE COMPANY WHICH RECEIVED THE INCREASES, AND FAILED TO DISQUALIFY HIMSELF OR MAKE A PROPER DISCLOSURE SO THAT PARTIES BEFORE HIM MIGHT MOVE TO DISQUALIFY HIM FROM HEARING THE TELEPHONE RATE CASE.

2.

WHETHER THE ORDERS DESCRIBED ABOVE SHOULD BE VOIDED BECAUSE THE TELEPHONE COMPANY FAILED TO DISCLOSE THE ABOVE DESCRIBED ACTS, AND IS THUS PROFITING MATERIALLY BY VIRTUE OF SUCH WRONGFUL SILENCE.

IN THE

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

NO. 24,571

THE TELEPHONE USERS ASSN., INC
(A Non Profit Association
Chartered in 1963 in D.C.)

Appellant

versus

PUBLIC SERVICE COMMISSION,D.C,ET AL

Appellees

**

Appeal from an Order of the U.S. District Court affirming Orders of P.S.C. relative to denying a refund of telephone rate increases ($2,368,000 per year) since 1965.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Jurisdiction is based on 28 U.S.C. 1291 and the pleadings in the U.S. District Court as they appear in the Record.

The Statement of the Case will bring forth all of the relevant facts in the Record which trace the jurisdiction from the Public Service Commission to this Court.

STATEMENTS IN COMPLIANCE WITH RULE 8

This case was previously before the Court as TUA versus PSC et al, numbers 21,318 and 21,319. Because of information gained by admission after the case left here, to the effect that the Chairman of PSC while chairman had three children employed by C and P, the case was taken back to PSC as a new suit asking voiding of the rate increases.

REFERENCE TO RULINGS UNDER RULE 8 (e)

The following rulings below appear in the Appendix in the following order, at the beginning of the Appendix:

PSC Order 5408, denying the Motion to Vacate and Rescind the rate increase orders, dated Nov. 26,1969.

PSC Order 5414 dated Dec 24,1969, denying the Petition for Reconsideration of the above order.

Order of Judge Corcoran, U.S.D.C., dated June 1970, affirming the preceding Orders of PSC.

STATEMENT OF THE CASE

BRIEFLY, this case seeks to void P.S.C. Orders 4887 and 4899 which granted annual increases in telephone rates of $2,368,000. Appellant contends that the orders are void or at least voidable because the P.S.C. chairman, who voted for the increases, failed to disclose that while he was chairman three of his children, including two minors residing in his own household, were on the payroll of the C. and P. Telephone Company, Inc. of D.C. which was under his regulation. This untold employment first came to light while the earlier case was before the Supreme Court of the United States on Certiorari. Appellant, first learning of this at that time, moved to remand for discovery; Appellees here countered with affidavits admitting that the information was true, but alleging that undersigned counsel had been told; before undersigned counsel could collect affidavits from other counsel and from General Duke, himself a Commissioner who heard the case, all of which state under oath that they too knew nothing about it, certiorari was denied. At this stage, the Appellee had argued that before the Supreme Court could hear the matter, Appellant first had to take it back to the P.S.C. for a ruling, then work it back up the judicial hierarchy if necessary. Appellant therefore filed papers before the P.S.C. requesting the voiding of the Orders and these were denied by Orders 5408 and 5414. Appellant brought the case to U.S. District Court, D.C. which found no error of law. Appellant now brings the case here.

REASONS FOR THIS APPEAL

Appellant seeks to void certain PSC orders granting rate increases, on grounds that the orders appealed from are void or voidab e because the Chairman of the Public Service Commission was in a conflict of interest situation and not only failed to disclose this, but failed to disqualify himself. The conflict arose from the fact that three of his children, including two minors residing in his own household, were employed by the telephone company, whose rates he was regulating; from the fact that he was given certain "patronage" privileges by the telephone company in the sense tht he could refer friends for employment and if they were qualified the telephone company would employ them; that he failed to disclose these facts properly; and perhaps in other ways that might come to light if there were an investigation. So little known was this connection that not even General Duke, a fellow commissioner who also heard this case, knew of it or the conflict of interests. See his affidaviy. None of the lawyers for intervenors knew of it. See their affidavits. There is no mention of the Conflict in the Record of the Case. The Tribunal thus was not impartial, and (Coumsel for) intervenors, including Appellant here, had no opportunity to move to disqualify the Chairman.

RELIEF REQUESTED

Appellant requests that the orders granting $2,368,000 added telephone revenues annually, be voided, and the money refunded. Appellant requests a hearing on the relations

between C. & P. and the ex-Chairman. To grant this relief, this Court must reverse the orders of the District Court and the present PSC.

1.

The Appellee is the Public Service Commission of the District of Columbia. C. &.P. is an intervenor. Below, this was an appeal under D. C. Code #43-705, which provides for appeals to the D. C. District Court from certain orders of the Public Service Commission. The order of the U. S. District Court signed 16 June 1970, found no legal error on the part of PSC. Appeal is taken indirectly from Public Service Commission Orders No. 5408 and 5414, issued November 26, 1969 and December 24, 1969 respectively, and directly from the order dated 16 June 1970 of the U. S. District Court. The former Order denied a motion to rescind an increase in telephone rates based upon reasons which appear below. The latter Order denied the Petition for Reconsideration which was filed in accordance with 43-705 as a preliminary requisite to the taking of this appeal. The District Court order in effect affirmed the PSC orders.

2.

Appellant is an intervenor in a telephone rate case which began in 1963 before the Public Service Commission. In 1965, the rate case produced Public Service Commission (hereinafter PSC) orders granting rate increases of approximately $2,360,000 per year. During the proceeding, General Services Administration participated as an intervenor and recommended that revenues be reduced by $3,000,000 to $4,000,000 annually. Intervenors Arthur S. Curtis and the Telephone Users Association, Inc.

appearing for themselves and others similarly situated, requested a refund in excess of $10,000,000, based upon charges by the Telephone Company (Chesapeake and Potomac Telephone Company of Washington, D. C. hereinafter C. & P.) which yielded over a period of successive years a rate of return far in excess of the 6.25% return on its investment which was authorized by the Public Service Commission in its orders at the preceding rate case. Other intervenors in the 1963 case, were Walter H. Mayo III, presently Assistant Attorney General of the Commonwealth of Massachusetts, a copy of whose affidavit is one of the papers in this case; Gordon M. Shaw, an attorney,

whose affidavit is one of the papers in the case; and Charles Bechhofer, an attorney who represented the D. C. Federation of Citizens Associations, whose affidavit is one of the papers in this case.

3.

The Public Service Commissioners who heard the case consisted of James A. Washington, Jr., Chairman, a lawyer by training; Edgar H. Bernstein, an economist; and General Charles M. Duke, the Corps of Engineers, United States Army. The affidavit of General Duke is a paper in this case.

4.

The Orders of the Public Service Commission which are sought to be rescinded are, No. 4887, issued December 22, 1964, and No. 4899, issued February 18, 1965.

5.

Congress has by statute created this Commission and has made it responsible for holding formal hearings and setting just and reasonable telephone rates. See Title 43, D. C. Code.

The jurisdiction of this Commission extends to the political boundaries of the District of Columbia and is therefore intrastate only.

In performing its rate making functions, this Commission balances the investor interest against confiscation and the consumer interest against exorbitant rates, Washington Gas Light Co. v Baker (1951) 188 F 2d 11, 88 U. S. App. D. C. 115). The parties before it in this proceeding were the stockholders as represented by the Company and the consumers as represented by the Telephone Users Association, Inc. (hereinafter TUA), GSA, and the other Intervenors.

To arrive at "reasonable, just, and non-discriminatory" rates as required by 43-301, D.C. Code, the Commissioners must be at all times completely impartial and neutral.

Section 43-201, D.C. Code, states as follows:

> "No person shall be eligible to the office of Commissioner of said Public Utilities Commission who is, or who shall have been during a period of five years next preceding his appointment, directly or indirectly interested in any public utility operating, owning, or having an interest in property in the District of Columbia; or in any stock, bond, mortgage, security, or contract of such public utility. If any such commissioner shall voluntarily become so interested, his office shall ipso facto become vacant; and if any such commissioner shall become so interested otherwise than voluntarily he shall, within a reasonable time, divest himself of such interest, and if he fails to do so his office has become vacant."

The purpose of 43-201 as just quoted is to set the policy of neutrality and impartiality on the part of each Commissioner.

6.

Appeals under 43-705 were taken by Arthur S. Curtis and the Telephone Users Association, Inc., hereinafter TUA, for themselves and others similarly situated. The Orders of PSC were affirmed by this Court, and were taken to the U. S. Court of Appeals, where the relief requested was not granted. Petition for Certiorari was filed in the United States Supreme Court in Case No. 1113. At that time, it was learned as a fact that while Chairman Washington was sitting on the Commission, the Telephone Company was giving employment to his daughter.- A rumor to this effect had come to Arthur S. Curtis through an anonymous telephone call, but Curtis (undersigned Counsel) was never able to confirm it with that degree of concretness which the Court required of an attorney.

7.

While certiorari was pending, Arthur S. Curtis succeeded in verifying through a conversation with J. Hillman Zahn, a Telephone Company executive, that the employment was a fact. Thereupon, motion was made by the undersigned asking that the Supreme Court send the Case back to a lower court or to the Commission in order to investigate the degree of involvement of Chairman Washington with the Telephone Company while he was sitting on the Commission

and hearing the Telephone Rate Case.

8.

Respondents replied with affidavits by J. Hillman Zahn, Vice President of C. & P., Chairman Washington, and others. Below are some quotations from these affidavits.

The affidavit of J. Hillman Zahn, May 14, 1969, states "between 1962 and 1964 when I was Vice President of the Company in charge of operations I was directly involved in the employment practices and policies of the Company"... "Among the persons with whom I communicated, were...James A. Washington, Jr., then Chairman of the Public Service Commission of the District of Columbia... Mr. Washington, referred persons to the Company as candidates for employment, in some instances furnishing the Company with the names of persons so referred ...Persons found to be qualified were usually offered employment."

The affidavit of Mr. Zahn further states that the following three children of James A. Washington, Jr. were employed by the Telephone Company while he was Chairman of the Public Service Commission:

1. Grace Charlotte Alexander, December 1962 to November 1965
2. James A. Washington, III, 18 years old, summer of 1963, $69.00 a week
3. Stephen C. Washington, July and August 1963, began $66.50 per week, raised to $69.00 a week; June, July, August, September (to September 4), 1964, $72.00 per week

The affidavit of James A. Washington, Jr., dated May 13, 1969, states:

"That I was Chairman of the Public Service Commission of the District of Columbia from October 1961 to October 1966" ""That between the years September 1963 and August 1965 I presided at the hearings regarding The Chesapeake and Potomac Telephone Company's application for $10,500,000 increase in rates."

..."during the latter part of the year 1962 the Public Service Commission held a conference with executives of the Telephone Company, the Gas Company and

the Electric Company for the purpose of determining ways and means of removing the racial imbalance in employment in public utilities of the District of Columbia. At that meeting the conferees discussed recruiting within the Negro community by advertising, by visits to Howard University and by references from the Commission to the Utilities of persons seeking employment. This activity was continued after this initial conference, with the first three meetings at six month intervals. As a result of these discussions the Chairman and others within the Commission referred persons to the Telephone Company ..." "Many of the persons referred by me to the Telephone Company were not personally known to me. Some of the persons referred by me to the Telephone Company were employed after qualifying."

The affidavits further state that the employment matters referred to dealt with the employment of Negroes.

Thus by admission of the Telephone Company and Chairman Washington, the Chairman was given power by the Telephone Company to refer persons who, like himself, were of Negro descent, to the Telephone Company for employment, with the knowledge that the referral was a ticket to preferential treatment and was tantamount to employment provided the persons referred by Washington were able to do the work. The affidavits further admit that Washington took advantage of this opportunity and referred a number of persons who were employed, thus in effect arguably showing a patronage type of arrangement between the Chairman and C. & P. in the sense that he had certain economic privileges with the consent of the Company.

9.

C. & P., a co-respondent, argued to the Supreme Court that all of this was new matter which had not been heard below, and that the Supreme Court was thus not a proper forum to consider it. The Supreme Court thereupon denied the Petition for Certiorari, without stating its reasons. A Petition for Rehearing was also denied.

10.

The Defendant here, with C. & P. which was a respondent before the Supreme Court, thus had argued that before the matter could be considered by the Supreme Court, it must first be presented to the Public Service Commission, which was the Trier of Facts in this case.

11.

On September 5, 1969, TUA filed with the Public Service Commission a paper entitled "Motion to Rescind Orders of this Commission Nos. 4887 (Dec. 22, 1964) and 4899 (Feb. 18, 1965), and for other relief," for itself and others similarly situated. This motion argued that the orders should be rescinded and that the money collected under them should be returned. The authorities cited were the Attorney General's Memorandum regarding the Conflict of Interest provisions of Public Law 87-849, issued when Robert F. Kennedy was Attorney General; 18 U.S.C. 201 and 208; Executive Order No. 11222; and various other codes, standards, and authorities. Following the Opposition filed by the Telephone Company, TUA filed a "Response," which contained affidavits by the following persons to the effect that they did not know nor were they informed by anyone that Chairman Washington had three children who were employed by C. & P. while he was Chairman, including at least two while he was hearing the C. & P. Rate Case, and including two minors residing in his own home: General Charles M. Duke, a Public Service Commissioner who sat on this very case with Washington; Gordon M. Shaw, an attorney, who was an intervenor in the 1963-65 case; Charles Bechhofer, an attorney, who represented the Federation of Citizens Associations in the 1963-65 case; Arthur S. Curtis, an attorney who represented TUA in the 1963-65 case; finally, Charles H. Mayo III, an attorney who was an intervenor in the 1963-65 case, presently Assistant Attorney General of the Commonwealth of Massachusetts.

12.

On November 25, 1969, PSC wrote to the FCC, objecting to a reduction in interstate telephone rates by $150,000,000 which the FCC had voted to become effective January 1, 1970. See Exhibit. Undersigned Counsel learning of this through a newspaper article, queried the Commission as to its accuracy in a hearing, obtained from PSC a copy of the letter, and moved to disqualify the members of this Commission from further proceedings for the reason that the present Commission had departed from its required status of neutrality when it joined the AT&T, the holding company which owns all of C. & P., before the FCC in arguing against the reduction of interstate rates. See Exhibit. This motion was denied by PSC. TUA filed with the FCC its own position, which opposed that taken by AT&T and PSC, in that TUA favored the present reduction of long-distance rates by FCC rather than leaving it to local Commissions like PSC to determine later whether local rates should be reduced in lieu of reduction in long-distance rates, particularly since PSC has held that there is no connection between local rates and long-distance rates.

13.

On November 26, 1969, one day after it argued by letter before FCC against the reduction of long-distance telephone rates by FCC, PSC denied the motion to rescind.

14.

On December 19, 1969, as required by 43-705 of the D. C. Code as a prerequisite to this appeal, TUA filed an Application for reconsideration of Order No. 5408 (November 26, 1969). This Application was denied by PSC Order No. 5414, dated December 24, 1969. This appeal, filed within 60 days of denial of Petition for Reconsideration, was thus timely filed.

THE STANDARD TO BE OBSERVED BY THIS COURT IN CONSIDERING THIS APPEAL

Section 43-706 of the D.C. Code, entitled "Appeal limited to questions of law", reads as follows:

> "In the determination of any appeal from an order or decision of the Commission The review by the court shall by limited to questions of law, including constitutional questions; and the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary or capricious."

In Washington Gas Light Co. v. Baker (1951),188 F 2d 11, 88 U.S. App. D.C. 115), our Court of Appeals held that the result of rate regulation must not be unreasonable, and the Commission must safeguard both the investor interest against confiscation and the consumer interest against exorbitant rates.

In Leeman v. Public Utilities Commission of the District of Columbia et al (1952), 104 F. Supp. 553), the District Court held that it could consider whether the conclusions of the Commission were adequately supported by findings of fact, and whether the findings of fact were sustained by substantial evidence.

In Michigan Consolidated Gas Co., Et Al, v. F.C.C. (U.S.C.A. 1960),_____, _____, our Court of Appeals held that where a regulatory agency has ignored factors which are relevant to the public interest, the scope of judicial review is sufficiently broad to order their consideration, and stated that these limits are not to be confused with the narrower ones governing review of an agency's conclusions reached upon proper consideration of the relevant factors.

In Sangamon Valley Television Corp. v. U.S. of A. and F.C.C., (USCA DC # 13,992, decided July 27, 1961), 106US AppDC30,33, 269 F 2d 221,224, our Court of Appeals set as a standard that private approaches to the members

of a Commission vitiated its action, citing Sangamon Valley Television Corp. v. U.S. & F.C.C., 106 U.S. App. D.C., 30,33, 269 F 2d 221,224. The Department of Justice in that case argued on behalf of the U.S. that "the basic fairness which requires that such a proceeding...by carried on in the open...can only be achieved by starting afresh". In that case, approaches ex parte to Commissioners rendered the proceeding voidable.

16.

STANDARD OF CONDUCT OF A PUBLIC SERVICE COMMISSIONER
AS SHOWN BY HIS OATH REQUIRED BY D.C. CODE 43-201

D.C. Code 43-201 states as follows:

"Before entering upon the duties of his office each commissioner, the secretary of the commission, the counsel of the commission and every employee of said commission shall take and subscribe the constitutional oath of office, and shall in addition thereto make oath or affirmation before the file with the clerk of the United States District Court for the District of Columbia that he is not pecuniarily interested, voluntarily or involuntarily, directly or indirectly, in any public utility in the District of Columbia."

Congress thus intended that a commissioner should not be interested in a public utility in the District of Columbia in any way at all. (Unless we are to believe that Congress merely intended he must have no interest on the day he takes office and swears his oath, but that what he does thereafter is his own business and not the business of Congress or the country.)

17.

RELEVANT STATUTES, EXECUTIVE ORDERS, AND MEMORANDA
OF THE ATTORNEY GENERAL OF THE UNITED STATES

A.

EXCERPTS FROM REVISED U.S.C.

18 U.S.C. 201. BRIBERY OF PUBLIC OFFICIALS TO WITNESSES.

(a) "...public official means...officer or employee...including District of Columbia"

(b) "Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official...with intent-

(1) to influence any official act

(c) "Whover, being a public official...directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or any other person or entity, in return for:

(1) being influenced in his performance of any official act;

* * *

(f) "Whoever...directly or indirectly gives, offers or promises anything of value to any public official...for or because of any official act performed or to be performed by such public official....

"Shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

18 U.S.C. No. 208

Acts Affecting a Personal Financial Interest

"(a)....whoever, being an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia...participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation...or otherwise, in a judicial or other proceeding....in which to his knowledge, he, his spouse, minor child...has a financial interest....

"Shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Note: Subsection (b) states that (a) shall not apply if the officer discloses to the person appointing him and obtains a ruling in writing that the interest is not so substantial as to affect his integrity; or if, by general regulation published in the Federal Register, the financial interest has been exempted from (a) as being too remote or too inconsequential to affect the integrity of Government officers' or employees' services.

B.

EXECUTIVE ORDER NO. 11222

May 5, 1965, 30 F.R. 6469

STANDARDS OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES

"Sec. 201....no employee shall solicit, or accept, directly or indirectly, any give, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any person, corporation, or group which-

"Sec. 401. (Reporting of Financial Interest)

"(a)...each full-time member of a...commission appointed by the President, shall submit to the Chairman of the Civil Service Commission a statement containing the following:

"(1) A list of all corporations....

"(A) with which he is connected as an employee...

"(B) in which he has any continuing financial interest...as a result of any current or prior employment..."

"Sec. 403. (a) the interest of a spouse, minor child, or other member of his immediate household shall be considered to be an interest of a person required to submit a statement by or pursuant to his part."

STATEMENT OF POINTS

1. The District Court erred in finding no error in the Orders of the Public Service Commission, which in turn found that earlier Orders of PSC(granting increases in local telephone rates of $2,368,000 per annum) were not void or voidable because the Chairman of said PSC had three children, including two minors residing in his home, while he was Chairman, and failed to make such a disclosure as would inform the lawyers trying the case of these facts or another Commissioner, U.S. Army General Duke, of these facts.

2. The District Court further erred in finding no reversable error, when it was clear that the telephone company made the conflict of interest situation possible by giving the above described employment to the chairman's children and friends, that the telephone company failed to disclose the relationship, and would profit from its wrongdoing unless the Orders granting the rate increases were voided or rescinded.

SUMMARY OF ARGUMENT

1. Chairman Washington was so involved with C and P through the employment of his three children and the employment of his friends by the telephone company, which his Commission was regulating, that he should have made a full disclosure on the record, disqualified himself from the case, and refused to participate in the case further unless all parties and the other commissioners requested in writing that he continue to participate in the case.

2. The Record is clear and undisputable that the Chairman failed to make a proper disclosure of his relationship with the C and P Telephone Company, Inc., and that the Telephone Company also failed to make a proper disclosure.

3. Had a proper disclosure been made, both Arthur S. Curtis, counsel for Appellant here, and Walter Mayo, III, an intervenor, now Assistant Attorney General for the State of Massachusetts, would have moved to disqualify the Chairman.

4. The employment of the Chairman's children and his friends was a substantial interest by the Chairman in the Telephone Case, which required the Chairman to recuse himself and make a full disclosure on the record.

5. The actions of the Chairman do not comply with the standards set by the Interim Advisory Committee on Judicial Activities appointed by the Chief Justice.

6. Because the telephone company made the whole situation possible by giving employment to three of the Chairman's children while he was chairman, and to his friends when he referred them for employment, the C and P committed wrongful acts, and should not be permitted to retain the rate increases which were voted to the C and P Telephone Co., D. C. by the Chairman and the Commission.

7. A principal area of information is as yet not uncovered and there should be Hearings and Discovery on the Full Involvement of the Chairman with C and P.

8. Legal authorities show that the proper disposition of this case does not permit of a rehearing on the proper rates to be charged retrospectively.

9. The papers were timely filed before PSC and that Commission had jurisdiction and authority to hear the matter.

10. It was error for P.S.C. to deny the Motion to Rescind.

11. It was error for P.S.C. to deny the Application for Reconsideration.

12. It was clearly erroneous for the U.S. District Court to find no error in the orders of P.S.C. denying the Motion to Rescind the earlier orders which granted the rate increases.

CONCLUSION

Placing blame where blame belongs therefore requires that this Court, as a matter of law, find that the rulings below were clearly erroneous, arbitrary, and capricious, and unreasonable, and moreover, since this is a tribunal with the power to set standards, reversable because the rulings below are contrary to the public interest and public policy.

Appellant therefore prays that the relevant orders be reversed, that they be declared void ad initio, and that all moneys collected thereunder, with interest added, be ordered to be returned to the public in accordance with later Orders of this Court.

ARGUMENT NUMBER ONE: ARGUABLY, CHAIRMAN WASHINGTON WAS SO INVOLVED WITH C & P AT THE TIME OF THE TELEPHONE RATE CASE, THAT HE SHOULD HAVE DISQUALIFIED HIMSELF OR ELSE HE SHOULD HAVE HAVE MADE A FULL DISCLOSURE ON THE RECORD, EVEN THOUGH THIS WOULD HAVE DIMINISHED HIS POWER TO OBTAIN JOBS FOR HIS FRIENDS.

Davis, in his authoritative book, ADMINISTRATIVE LAW TEXT, states at P.223:

> "...unlike Supreme Court Justices, each of whom determines his own qualifications...examiners and other deciding officers are not left free to make their own determinations concerning their own qualifications."

The Administrative Procedure Act, # 7 d, states:

> " .. any such officer may at any time withdraw if he deems himself disqualified; and upon filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as part of the record and decision in the case ."

Canon No. 32, of the Canons of Judicial Ethics, states:

> "A judge should not accept any present or favors from litigants, or from lawyers practising before him or from others whose interests are likely to be submitted to him for judgment."

Canon No. 34 states:

> " In every particular his conduct should be above reproach... he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties."

An Ancient Precedent quoted in the Canons of Judicial Ethics, is :

> "Thou shalt not wrest judgment; thou shalt not respect persons, neither take a gift, for a gift doth blind the eyes of the wise, and pervert the words of the righteous."
> Deuteronomy XVI,19.

The PREAMBLE of the CANONS, states as follows:

> " The Association accordingly adopts the following Canons, the spirit of which it suggests as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them."

Canon No. 4, Avoidance of Impropriety, states:

> " A judge's official conduct should be free from impropriety

and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach."

Canon No. 13, on Kinship or Influence, reads:

"A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or person."

Canon No. 24, on Inconsistent Obligations, reads:

"A judge should not accept inconsistent duties; nor incur obligations pecuniary or otherwise, which will in any way appear or interfere with his devotion to the expeditious and proper administration of his official functions."

Canon No. 25 reads:(Business Promotions and Solicitations for Charity)

" A judge should avoid giving grounds for any reasonable suspicion that he is utilizing the power and prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or of the influence of his name to promote the business interests of others; he should not solicit for charities, nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties."

Canon No. 33 reads: (Social Relations)

"...He should ... in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct."

Canon No. 25 is important if this Court wishes to go back into the reappointment of Mr. Washington and the Senate Hearings thereon, where it was pointed out that while he was Chairman, he solicited Mr. Donald Bittinger, of the Gas Company, for financial support in a new bank in which he, Washington, had a financial interest (stock purchased with borrowed money).

Canon No. 33 is important if the Court wishes to inspect the transcript of hearing on Mr. Washington's appointment as attorney in the Transportation Department, for the Senate Transcript shows that Washington's daughter was introduced to Mr. Zahn at a social gathering given by Washington's sister, at which Chairman Washington was present, and Zahn was told that the said daughter was on the payroll of the telephone company (according to Zahn).

A "financial interest" relates to money. IT is thus basic that a person has a financial interest in his employment, since money comes from that employment. Executive Order No. 11222, see page 11,12 above, in Sec. 403, states (a) that"the interest of a...minor child...shall be considered to be an interest...." Section 201 of the Order forbids"soliciting or accepting ", "directly or indirectly which...conducts operations or activities regulated by his agency;..." Since it is admitted by both the telephone company and Chairman Washington that in the Summer of 1964, while the Rate Case was going on, the Chairman's minor child was employed by the C & P, the Chairman had such an interest in the proceeding as would fall within the meaning of the Order and be prohibited.

Moreover, under 28 U.S.C. No. 201, Congress has spoken that it is a crime either to offer, or to accept, anything of value in return for being influenced in the performance of any official act. Here the Chairman admits that he held meetings with the telephone company (and other utilities) for purposes of obtaining employment of other Negroes in these companies. C and P says that it was the initial mover in this venture, and that it permitted the Chairman to refer people to it for employment, and that he did, and that his qualified referrals were given employment. The power to give jobs, by referring people to the C and P, is a very important power. In Congress, this power is known as patronage; this Court could consider that it was the same here. On what basis did Washington call the meetings? On the basis of being a Public Service

Commissioner, with power to regulate rates. Why was he given the privelege to refer persons for employment, when the personnel office of Howard University or the U.S. Employment Service, or the Office of Economic Opportunity was specialized in and better equipped than the Chairman to do the task? Because it tended to create an obligation in the matter of regulation, an obligation which if not fulfilled by the Chairman would lead to a loss of privelege both in future referrals and in a review of the services of those who had already been referred and employed.The position of the Chairman was such therefore that his interests were in conflict, on the one hand was his obligation to to general public of consumers, on the other was the obligation he had incurred to the stockholders by accepting the opportunity to find jobs for other Negroes in C and P and the dangers to which he would expose them if he failed in his new obligation to the stockholders.

Similarly, 18 U.S.C. No. 208, quoted on page 11, supra, ACTS AFFECTING A PERSONAL FINANCIAL INTEREST, spells out in Subsection (a), that one who, being like the Chairman, an officer of an independent agency of the District of Columbia, participates in a decision or proceeding in which to his knowledge, he, his spouse, minor child, ...has a financial interest, has engaged in an act which is prohibited. However, 208 makes it possible to obtain a reprieve from the statute by going to the President, fully disclosing, and obtaining a ruling in writing that the interest is not so substantial as to affect his integrity. At no time has Chairman Washington produced a ruling from the President exempting him from 18 U.S.C. No. 208.

The consumers, knowing nothing of the arrangements between C and P and the Chairman, as to the employment of his children and his referrals, were thus not on an even footing with the telephone company in the proceeding. Had they known, perhaps they could have put themselves on an even footing by finding work for persons referred by him, work that is, in non-utilities, in this

thing which was so much of interest to the Chairman. Because the parties were thus not on an equal footing, the proceedings must be vacated, since due process of law requires that all parties be equal before the Court and that all relevant matters be public, open, and known to all parties. See Sangamon Valley Television Corp. v United States, 269 F 2d 221, where substantially the same argument was made by the United States, and the Court of Appeals agreed, stating, " Private approaches" to members of a Commission by parties interested therein " vitiated the Commission's action".... See also, Massachusetts Bay Telecasters, Inc. v F.C.C.,261 F2d 55. In Sangamon, the Department of Justice argued, " that the basic fairness (which) requires that such a proceeding...be carried on in the open can only be achieved by starting afresh."

The affidavits of counsel in the telephone rate case, which appear below, show that, despite the involvement of the Chairman, he failed to disclose this involvement to his fellow Commissioners and, further, he failed to disclose this involvement to the lawyers who were counsel in the case.

In view of this failure to make disclosure, and in light of the authorities cited above and elsewhere in this brief, the Orders of the Commission, in which the Chairman participated, and which granted rate increases to the utility which provided the jobs for the Chairman's children and for his friends, should be voided and the monies refunded.

ARGUMENT NUMBER TWO: THE RECORD IS CLEAR AND BEYOND DISPUTE THAT CHAIRMAN WASHINGTON FAILED TO MAKE A PROPER DISCLOSURE OF HIS ECONOMIC RELATIONSHIP WITH THE TELEPHONE COMPANY, AND THAT THE TELEPHONE COMPANY ALSO FAILED TO DISCLOSE.

19.

THE CHAIRMAN'S OWN AFFIDAVIT REFUTES THE CLAIM THAT HE MADE A PROPER DISCLOSURE

The affidavit of Chairman Washington, paragraph 6, reads:

> "6. That during the course of the hearings but before the preparation of the opinion referred to above, Mr. Arthur S. Curtis approached me in my office at the Commission and stated that he had heard a rumor to the effect that I had a daughter who was employed at the Telephone Company. In response I stated that it was not a rumor but a fact. I then asked the reason for his inquiry and indicated to him that, if he was intimating that the fact of her employment would have some effect upon my impartiality, he should raise this on motion. He indicated that he did not care to do so and that he would drop the matter. He then left the office.
>
> "7. That I informed Commissioner Edgar H. Bernstein of this matter shortly thereafter and also reported my conversation with Mr. Curtis to the Executive Secretary, Mr. Joseph S. Greco."

Thus the affidavit of Washington itself shows that a proper disclosure was never made. He failed to disclose the employment of his two children during his tenure; he failed to disclose that he was referring people to C and P for employment and that they were being employed; he failed to disclose anything at all to General Charles M. Duke, United States Army, who was also a member of the Public Service Commission; he failed to disclose to

ANY OF THE ATTORNEYS who were intervenors in the case being tried before him, and whose affidavits appear below. In view of these "oversights", the affidavit of undersigned Counsel, Curtis, giving a different view of the events than the Chairman gave, should be additionally interesting.

20.

CURTIS' AFFIDAVIT

In his affidavit, which appears in the Record of this case, Curtis states:

> "I never went to the office of Washington to discuss the matter of his daughter's employment by the telephone company. Here are the facts. I received a call over the phone, which asked me did I know that the Chairman's daughter was so employed and had received special treatment and quick promotions. A woman was speaking and would not give her name. I then called Joseph Greco, secretary to the Commission. He transferred me to Washington, who began talking about the racial policies of the utilities, and when the conversation ended I still did not know whether his daughter was working for the telephone company. At the hearings in the District Court I again tried to draw out the information, bysuggesting it to Barnes, but he simply sat there, and said nothing. Therefore, the first real proof I had of this fact was when I succeeded in obtaining the information from Mr. Zahn this month. I called Mr. Greco some time after his referral of my call, and inquired why he had put me through to Washington when I was talking to him. As I recall, I was told that after my call, Washington had a very uneasy day, and kept walking around his desk. I also learned at the time of the second call, that the daughter was now at George Washington University, which appears to mean that my call was put through in the first place after the Hearings had ended. At no time did Washington invite me to move to disqualify him, and at no time did I state I would forget about the matter, because frankly, I did not even know what the matter was. If I had known that three of the children of Washington were on the payroll of the Telephone Company while I was trying so hard to represent the public in that hearing, I would have moved to disqualify him, and if that had failed, I would have sought Mandamus, to end the Hearings."

21.

NOT EVEN GENERAL CHARLES M. DUKE,
ALSO A PUBLIC SERVICE COMMISSIONER
WHO HEARD THE CASE, WAS TOLD THAT
CHAIRMAN WASHINGTON HAD CHILDREN
EMPLOYED BY C & P.

The affidavit of General Charles M. Duke, U.S. Army, who was a Commissioner hearing the Telephone Rate Case along with Chairman Washington and Commissioner Bernstein, is attached as part of the Record in this case, and reads:

AFFIDAVIT OF FORMER PUBLIC SERVICE COMMISSIONER

1. The undersigned states that the following is true to his best knolwedge and belief:

a) That he was Public Service Commissioner in the District of Columbia during the Telephone Rate Case, 1963-5;

b) That at no time was he informed nor did he know, during the rate case, that James A. Washington,Jr., the Chairman, had three children working for C and P (D.C.) while he was Chairman of P.S.C.;

c) That at no time did he know, nor was he informed, during the rate hearings, that the said Chairman Washington had at least two children, one of whom was a minor residing in the Chairman's household, employed by C & P (D.C.) while he was hearing the telephone rate case..

S/ C.M. Duke

Subscribed and sworn to before me this 21st day of October 1969.
My commission expires: 3/30/71

Jerome S. Heller, Notary Public
State of New York

22.

INTERVENOR WALTER MAYO, III, PRESENTLY ASSISTANT ATTORNEY GENERAL OF THE STATE OF MASSACHUSETTS, WAS NOT INFORMED EITHER.

The affidavit of Walter Mayo, III, an Intervenor who represented the public in the case before PSC along with undersigned Curtis, reads as follows and is part of the Record which comes here from PSC:

AFFIDAVIT

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK,SS

WALTER H. MAYO, III, being first duly sworn, deposes and says:

(1) That he was a resident of the District of Columbia from March 1963 to August 1967;

(2) That he intervened in the proceedings before the Public Service Commission of the District of Columbia with respect to the Application of

the Chesapeake and Potomac Telephone Company to increase its rates and participated in those proceedings from 1963 through 1965;

(3) That during those proceedings one James A. Washington, Jr. was Chairman of the Public Service Commission;

(4) That at no time prior to, during, or after those proceedings was your affiant advised that three of Mr. Washington's children were employed by the Chesapeake and Potomac Telephone Co., nor was your affiant advised that a minor child of Mr. Washington who resided in the latter's home was employed by the Chesapeake and Potomac Telephone Company;

(5) That, since September 1967, your affiant has held the position of Assistant Attorney General of the Commonwealth of Massachusetts, in which position he has supervised all litigation with respect to public utilities in which the Commonwealth is an interested party;

(6) That, in your affiant's professional opinion, the circumstances that children of James A. Washington, Jr. and more particularly a minor child residing within his household, were employed by the Chesapeake and Potomac Telephone Company was ground for disqualification of James A. Washington, Jr. from hearing or deciding the application of the Chesapeake and Potomac Telephone Company from an increase in its rates;

(7) That, in your affiant's professional opinion, the failure of James A. Washington, Jr. to disclose the facts stated in paragraph (4) supra prior to or during the proceedings before the Public Service Commission was grossly improper and rendered all proceedings before said Commission invalid and illegal;

(8) That, had your affiant been aware of the facts stated in paragraph (4) supra, he would have moved to have the said James A. Washington, Jr. disqualified from hearing or deciding the application of the Chesapeake and Potoman Telephone Company for an increase in its rates.

S/ Walter H. Mayo III

Sworn to and SUBSCRIBED
before me, on this 15th day
of October 1969 S/ Russell F. Landrigan Notary Public, Commonwealth of Mass.
My Commission expires: June 4, 1971

23.

NEITHER GORDON SHAW NOR CHARLES BECHHOFER, BOTH LAWYERS IN THE PROCEEDINGS, WERE INFORMED OF THESE FACTS.

The Record which comes to this Court contains affidavits of two other attorneys who participated with Walter Mayo III and Arthur S. Curtis on the side of the general public. Mr. Bechhofer in fact represented the Federation of Citizens' Associations. Both men have given oaths which parallel that of Walter Mayo and Arthur S. Curtis, namely that they had no knowledge of the employment of any of the Washington Children by C and P.

24.

UNDERSIGNED COUNSEL HAD NOTHING BUT RUMOR AND AN ATTORNEY CANNOT PROCEED ON THE BASIS OF RUMOR

The affidavit of Arthur S. Curtis, a paper in the case, indicates that he had nothing but rumor, and then only as to the daughter, prior to the Supreme Court stage. This affidavit, which might have been less strong when confronted with that of a Commissioner alone, is certainly in an entirely different posture when backed up by that of another Commissioner a General in the United States Army who has no reason to tell anything but the truth (General Duke) and the affidavits of three other attorneys who were in the case - Walter Mayo III, Charles Bechhofer, and Gordon Shaw.

The Federal Courts have held that an attorney must have more than rumors before he can proceed in such a matter, see Fox West Coast Theatres, 88 F. 2d 212, cert. den. 301 U.S. 710 (1937).

Therefore, it was not possible for undersigned counsel to bring the matter to the attention of the Courts earlier than he did.

ARGUMENT:

POINT NUMBER THREE:

25.

BOTH WALTER MAYO, III, AND ARTHUR S. CURTIS WOULD HAVE MOVED TO DISQUALIFY CHAIRMAN WASHINGTON HAD THEY BEEN INFORMED OF THE EMPLOYMENT OF THE CHAIRMAN'S CHILDREN BY C & P.

The affidavits of Walter Mayo, III, and Arthur S. Curtis indicate the

serious of the matter. Mr. Mayo's affidavit states flatly that he would have moved to disqualify Chairman Washington, and further states that in his professional opinion, as Assistant Attorney General of the Commonwealth of Massachusetts, the conduct of Chairman Washington was disqualifying but that Mr. Mayo was not timely informed so that he could make the motion.

ARGUMENT NUMBER FOUR: THE EMPLOYMENT OF THE CHAIRMAN'S CHILDREN AND HIS FRIENDS WAS A SUBSTANTIAL INTEREST BY THE CHAIRMAN IN THE TELEPHONE RATE CASE.

Before the Public Service Commission the Telephone Company argued that the giving of employment to the children and friends of the Chairman was not so substantial as to disqualify him from hearing the rate case. The word "substantial" appears in 28 U.S.C. 455, which requires federal judges to disqualify themselves (" Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest...")

Let us look at the admitted facts first. It is admitted that one child worked for a period of years, the daughter. It is admitted that two minor children worked respectively one summer and two summers, sufficient to earn $1,000. Is the sum of $1,000. a substantial sum? The question answers itself.

"Substantial" is an adjective meaning something worth while as distinguishe fromsomething without value or merely nominal, In re Krause's Estate, 21 P 2d 268, 173 Wash.1. It means real worth and importance; of considerable value; valuable, Tax Commission of Ohio v American Humane Education Soc. 181 N.E. 557, 42 Ohio. App. 4. In Cookley v Marple, a personal injury suit in neighboring West Virginia, an award of $1,000. for personal injuries and property damages sustained by a driver of an auto who was struck from the rear was held as a matter of law to be "substantial",159 S.E.2d 378,382. Thus on the basis of the above authorities, the monies paid to the minor children of the Chairman was legally sufficient to be sufficient in quantity

and quality, without turning to the questions, what was it worth to the Chairman to be able to obtain jobs at the utilities for his friends, and what was it worth to him to have his children so employed rather than being on the streets of Washington, D.C. The favors bestowed upon the Chairman were thus as to move a stone to some reciprocal sentiments by any reasonable interpretation. In holding otherwise, the Public Service Commission departed from common logic and accepted reasoning, it is argued.

ARGUMENT NUMBER FIVE:

THE ACTIONS OF THE CHAIRMAN DO NOT MEET THE STANDARD OF CONDUCT AS SET BY THE INTERIM ADVISORY COMMITTEE ON JUDICIAL ACTIVITIES, APPOINTED BY THE CHIEF JUSTICE

The Committee, which is composed of six experienced federal judges and an associate justice of the Supreme Court is chaired by Judge Elbert Parr Tuttle of the Fifth Circuit. It has the duty of consulting with and rendering advisory opinions to the judicial councils of the circuits and to individual judges upon request. In reaching its determinations the Committee is using the American Bar Association's present Canons of Judicial Ethics as a basis for promulgating its advisory opinions.

In Opinion No. 20, which deals with Stockholdings, language is used which appears applicable to the case under consideration in instant Brief for Appellant. The premises are, of course, that a Public Service Commissioner, appointed by the President of the United States and approved by the Senate, who has power to issue orders involving millions of dollars, should conduct himself according to the standards of federal judges; and, that an economic interest in the income of his children is comparable to an economic interest in ownership of stock by these children, both being money coming in.

The Committee cites Section 455 of Title 28, U.S.C., which provides in pertinent part:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest..."

The Committee then continues:

"No litmus paper test of what amounts to a substantial interest is available; the judge must consider what the parties and the public would regard as a substantial interest as well

as what he and the lawyers think."

"Canon 29 of the present Canons of Judicial Ethics reads:

> "A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved.***"

"The Preliminary Statement and Interim Report issued in June 1970 of the American Bar Association's Special Committee on Standard of Judicial Conduct, proposes the following Canon:

> "8.Disqualification. A judge should disqualify himself in any proceeding in his court in which he knows or should know that he, individually or as a fiduciary, or any member of his family residing in his household, has an interest in the matter in controversy or the affairs of a party to the proceeding.
>
> "(a) An 'interest' for the purpose of this standard includes any legal or equitable interest, no matter how small.....
>
> "(b) Disqualification should be by full disclosure of record as to the nature and extent of the judge's interest. When such disclosure indicates that a judge's interest is insubstantial, he may upon written request by all parties to the proceeding withdraw his disqualification and participate int the proceeding."

"In order that there be no question about the voluntary character of the consent, we recommend the practice now followed by some courts, namely: that the judge advise counsel at the earliest practicable time, through the Clerk of the Court or in some other appropriate way, of his interest..... and ask the lawyers to reply in writing to the Clerk whether they wish the judge to hear the case or participate in the hearing of an appeal. Unless the attorneys for all parties request the judge to continue, the Clerk should not tell the

judge which lawyers did not make such request, and the judge should not act thereafter in the case."

It is clear that the standard of conduct approved by the Interim Advisory Committee was not the standard which was followed by the Chairman of the Public Service Commission in permitting three of his children, including two minors residing in his own home, to be employed by the local telephone company which he was regulating.

The American Bar Association Committee on Professional Ethics, in interpreting Canon 25, stated in its Formal Opinion 113:

> " It is generally accepted in a rational philosophy of life that with every benefit there is a corresponding burden. Accordingly, one accepts judicial office sacrifice some of the freedoms .....that otherwise he might enjoy.
>
> When he accepts a judicial position, ex necessitate rei, he thereby voluntarily places certain well recognized limitations upon his activities."

The affidavits of the lawyers who participated in the trial of this case show conclusively that there was no proper disclosure by the Chairman.

The affidavit of General Duke shows that the employ the the chairman's children was known not even to the other members of the Commission.

Under these circumstances, the holdings below are clearly erroneous and should be reversed.

ARGUMENT
NUMBER SIX: THE PROBLEM IN PROPER FOCUS: C&P SAID NOTHING !

The true issue before this Court is the conduct of the C and P Telephone Company (D.C.) in giving the employment to three of the chairman's children and also failing to disclose same, meanwhile obligating the Chairman, to the thinking of reasonable men, to act in its favor. The conduct complained of on the part of the Chairman, was only possible because of the active participation in such conduct by the executives of C and P.

ARGUMENT NUMBER SEVEN:

27. A PRINCIPAL AREA OF INFORMATION IS AS YET NOT UNCOVERED AND THERE SHOULD BE HEARINGS AND DISCOVERY ON THE FULL INVOLVEMENT OF THE CHAIRMAN WITH C & P

Both C & P and Chairman Washington admit that he was sending persons to the telephone company for employment and that at least some were employed. Who were those referred, who were those employed, what if any was their kinship to Washington himself, how many were old friends or political allies? These are important facts which should be discovered and made public, in the public interest, not only to clarify the present proceeding but also to prevent reoccurences.

Appellant therefore requests public hearings, with full discovery of the records of all of the utilities, the Commission, and so forth. The public must be certain that this evidence of connections between a Commissioner and a utility is not merely the small portion that one sees when viewing the proverbial iceberg which conceals more than it shows.

ARGUMENT NUMBER EIGHT:

28. LEGAL AUTHORITIES SHOW THAT THE PROPER DISPOSITION OF THIS CASE DOES NOT PERMIT OF A REHEARING ON THE PROPER RATES TO BE CHARGED RETROSPECTIVELY.

The telephone company argues that if the rate increase orders are rescinded there should be a new hearing to determine what the rates should have been retrospectively, and that thus the phone company should be permitted to keep

the money anyway.

This question was neatly and competently disposed of by our U. S. Court of Appeals for the District of Columbia Circuit in the case of Williams and Trask v. Washington Metropolitan Area Transit Commission, Respondent and D. C. Transit, Intervenor, and other cases tried together as Nos. 20,200; 200,201; and 200.202, hereinafter, WMATC. After setting aside the orders in that set of cases which granted bus rate increases, the Court turned to the problem of the dispositions of the funds collected representing the difference between the older rates and the new rates. To permit the utility to retain this excessage would be to give legal effect to an invalid order, said the Court, p.32. Moreover, since the setting of rates was a legislative function, the Commission had no authority to set rates for the past, but could only set rates as to the future. Thus the court applied a formulae which allowed as much of the money as the adverse parties were willing to concede should go to the utility, p. 40. Applying this formula to the present case, we find that GSA argued that there should be a reduction in revenues by $3,000,000 to $4,000,000 per annum; therefore, none of the excess money collected can equitably be retained by the telephone company and all of it beyond what it would have collected under the old rates must go into a fund if it cannot be returned directly. In the case of telephones, unlike the case of bus fareboxes, it is possible to trace the sources of the money and to make restitution directly. Moneys not returned would of course therefore go into a fund for the benefit of telephone users.

In view of the above authority, the argument of the telephone company should have no standing before this commission and should be disregarded.

ARGUMENT NUMBER NINE:

29. THE PUBLIC SERVICE COMMISSION HAD JURISDICTION TO HEAR THIS MATTER, AND IT WAS TIMELY FILED THERE.

In the original Motion to Rescind, your Appellant wrote as follows: this commission has authority to hear this matter by virtue of a statute, 43 D.C. Code 702, which states that it may reconsider its orders "AT ANY TIME", vis:

> 43-702: COMMISSION MAY RESCIND, ALTER, OR AMEND ORDER FIXING RATES
>
> The Commission, may at any time, upon notice to the public utility and after opportunity to be heard as provided in section 43-410, rescind, alter or amend any order fixing any rate or rates, tolls, charges, or schedules, or any other order made by the commission, and certified copies of the same shall be served and take effect as herein provided for original orders.

This matter, relative to Commissioner Washington's continuing to sit on the case despite the fact that at one time three of his children were employed by a party before him, the Telephone Company, including two minor children living in his own household, without disclosing these facts on the record, has never been considered by this Commission. The matter first came to light before the Supreme Court at the Certiorari stage. Thus it is a proper matter for this tribunal, even though certiorari was denied, as is shown by the holdings of the Supreme Court itself. In Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, at pp. 50, 51, 58, S.Ct. 459, 463, 82 LEd. 638 (1938), the Supreme Court referred to

> ..."The long settled rule of judicial administration that no one is entitled to judicial review for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.."

In his authoritative text on Administrative Law, Davis points out that "probably every court requires exhaustion when the question presented is one within the agency's specialization, and when the administrative remedy is as likely as the judicial remedy to provide the wanted relief." 2 Davis at

p.56 And in Unemployment Compensation Commission of Territory of Alaska v. Aragon, 329 U.S. 143,155,67 S. Ct. 245,241, 91 L. Ed. 136 (1946), the Supreme Court said:

> "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action."

Thus the denial of certiorari had no meaning for the matter before us now, as is shown by the following citations. In U.S. ex. rel. Finch v. Ellicott, U.S. Commissioner, 3 F 2d 496, it was held that certiorari...

> "is a revisory remedy for correction of errors of law apparent on the record, and will not lie where there is another remedy, except for want of jurisdiction."

In U.S. v. Jaskiewicz, 278 F. Supp. 525, the District Court in Pennsylvania held (1968) that the U.S. Supreme Court's denial of certiorari imports nothing as to the merits of the case but means merely that for whatever reasons there were not four members of the Court who wished to hear the case.

The U.S. District Court in Florida held in 1967 in Rutledge v. City of Miami, 267 F. Supp. 885, that the denial of certiorari does not carry with it the presumption that the U.S. Supreme Court affirms sub silento the actio taken by the lower court. To the same effect are Parker v. Ellis, Tex. 1960 80 S. Ct. 909, 362 U.S. 574, 4 L.Ed. 2d 963, and Griffin v. U.S., App. D.C. 1949, 69 S. Ct. 914, 336 U.S. 704, 93 L.Ed. 942.

The U.S. Court of Appeals in Texas stated in Texas Construction Co. v. U.S. etc, in 1956, that the Federal Supreme Court's denial of certiorari is not an adjudication of anything. 236 F 2d 138.

The U.S. Court of Appeals for New York held in the case of Inre Luma Camera Service 157 F. 2d 951 (1946) that the denial of certiorari has no precedential significance. Since then, in 1966, the District Court for New York held that denial of certiorari has no precedential significance. Since

then, in 1966, the District Court for New York held that denial of certiorari cannot be considered as an expression of opinion upon the merits of any issue involved, Olsen v. Board of Education of Union Free School Dist. No. 12, Malverne, N.Y., 250 F. Supp. 1080.

The U.S. District Court of Utah stated in 1952 that the denial of certiorari does not prove anything except that certiorari was denied, Ex parte Sullivan, 107 F. Supp. 514.

The foregoing authorities are set forth because the Commission will probably be greeted with the argument that it cannot consider this pleading because certiorari was denied.

ARGUMENT NUMBER TEN: 30. IT WAS ERROR FOR PSC TO ISSUE P.S.C. ORDER NO. 5408 DENYING THE MOTION TO RESCIND

On November 26, 1969 the present Public Service Commission, no member of which heard the facts or saw the witnesses in the 1963-65 Telephone Case, denied the motion to rescind in the following words:

"We are dealing here with orders which have already been subjected to a searching judicial review at two levels -- in the United States District Court and in the United States Court of Appeals. Both course have upheld the Commission's determination as lawful and correct. TUA v. PSC, 271 F. Supp. 393 (D.C.D.C. 1967), aff'd, No. 21,318, D.C. Cir., Oct. 21, 1968 (unreported), cert. den. 395 U.S. 910.

Movant now seeks to have these orders rescinded on the basis of allegations that the then Chairman of the Commission should not have participated in the decision. We are presented with sworn affidavits which indicate that movant was aware of the circumstances on which he bases this claim while the matter was still pending before the Commission. /2 He made no motion whatever at that time, however, or at any time until the very final stage of judicial review. The authorities make it abundandantly clear that we should reject such a dilatory attack on the Commission's order. Pacheco v. People of Puerto Rico, 300 F.2d 759, 759, 760 (1st Cir. 1962); Lucas v. United States, 325 F. 2d 867 (9th Cir. 1963); Kramer v. United States, 166 F.2d 515 (9th Cir. 1948); R.A. Holman & Co. v. SEC, 366 F.2d 446 (2d Cir. 1966); Converse v. Udall, 262 F. Supp. 583 (D. Ore. 1966); Bethlehem Steel Co. v. NLRB, 120 F.2d 641 (D.D.C. 1941).

/2 Movant denies that he learned of the circumstances on which he relies at this stage but has admitted he heard rumors of them before the District Court had acted on review.

Moreover, there is no authority cited to us, or of which we are aware, that would justify setting aside the orders and refunding the increases granted under the circumstances here presented. The case of Williams v. WMA F.2d (D.C. Cir. Nos. 20,200; 20,201; 20,202; decided October 8, 1968) relied on by movant, does not stand for any such proposition. That was a case involving substantive errors raised both before the Commission and in a timel manner on review.

In short, we are dealing here with Commission orders entered in 1964 and 1965. We have reviewed the orders and we find that they are a well-grounded and cogent disposition of the issues presented in the proceedings leading up to them. Many of the issues were resolved contrary to the positio taken by the Telephone Company and the company received only a fraction of th increase it sought. The orders have been reviewed and upheld by two courts. We find no grounds for rescinding them in allegations whose bases has been known to the movant for several years."

31.

ARGUMENT NUMBER ELEVEN: IT WAS ERROR FOR PSC TO DENY THE APPLICATION FOR RECONSIDERATION OF ORDER NO. 5408, (Nov. 26, 1969)

Your Appellant, as required by the D.C. Code, preserved the Case for this Court, by filing an Application for Reconsideration on December 19, 1969 setting forth the following grounds of error:

1. Moveant incorporates by reference all of the arguments found in its Motion to Rescind and its Response.

2. Moveant incorporates by reference its Motion to Disqualify Members of this Commission, filed in Formal Case No. 538, a copy of which i attached hereto, and argues that the ruling in this Motion was made after this Commission had argued on the side of the Telephone Company in the form of a letter to F.C.C., arguing against decrease in rates, and therefore had disqualified itself from further judging matters between consumers and stockholders, as a matter of law.

3. That the conclusions set forth in the Order of November 26th are not adequately supported by findings of facts;

4. That the findings of facts made by this Commission in its Order of November 26th are not sustained by substantial evidence;

5. That the findings and conclusions of this Commission are, within the meaning of 43-706 of the D.C. Code, unreasonable, arbitrary and capricious.

6. That this Commission erred as a matter of law in ignoring the affidavits of other lawyers in the case to the effect that they knew nothing about the employment of three children of the Chairman by the telephone company while he was Chairman, and at least two while

he was hearing the telephone case, including at least one minor residin in his own household, and further erred in ignoring the affidavit to the same effect of General Duke, a Public Service Commissioner sitting on the same case with Chairman Washington; Further, under 43-201, D.C. Code, Chairman Washington was further disqualified in that employment of his children made him "interested" within the meaning of that statut

7. That this Commission erred as a matter of law and fact as described in 3 thru 6 above, in stating that the Federal Courts above (Par. 4 of the Order of Nov. 26th) have reviewed the matters now on appeal. No Court has considered the matter of the Chairman's conflict of interest, since it was now known until the case was in the Supreme Court stage, and could not be considered there because the Supreme Court is an appellate Court and this matter was not on appeal since it had not been considered by this Commission.

8. That this Commission is unreasonable and arbitrary and capricious in its footnote 2, page one, since at no time did Moveant admit that he "knew" of "the circumstances...before the District Court had acted on review." The affidavits clearly show that there was nothing but a rumo which could not be substantiated into the hard fact which a lawyer needs before he can make statements regarding conflict of interest by a member of a Commission, prior to the Supreme Court's stage of the case. Further, it is unreasonable to hold that Moveant acted-on "admitted that he knew of them" before the District Court had acted on review, when the "circumstances" consist of THREE CHILDREN including two minors residing in Washington's household being employed by the telephone company, and Washington himself alleged only that Curtis knew of one emancipated daughter being so employed. Even if this Commission should find that Curtis knew of one emancipated daughter being so employed, that is quite a different thing both in quantity and quality from knowi that there were THREE children so employed. At most, Washington's affi david can be taken to mean that Curtis knew of the employment of ONE EMANCIPATED CHILD, and that Curtis failed to move to disqualify on the basis of that alone. Washington's affidavit CANNOT be taken to mean th Curtis knew of the employment of THREE CHILDREN. Neither, indeed, can this Commission find any fact or allegation anywhere that Curtis or anyone else but Washington and the Telephone Company knew of the employ ment of three Washington children, Therefore, the finding of the Commi sion on this point, and its conclusions, depart from the legal standard set forth in 2-6 above.

9. This Commission erred further in failing to grant refund rights to the general public on the ground that one of several attorneys allegedly knew of the Chairman's involvement with the telephone company. The pub lic has rights through the other attorneys who were present, even thoug they are not present now. To say, as this Commission has just said, that the telephone company can retain $14,000,000 of the public's money because one of the several lawyers present knew something which might have thrown out the proceeding, is clear error.

10. That in view of the admitted involvement of the former chairman with the telephone company is legal error (2-6) to fail to order the hearing requested in order to determine whether there were other involvements

which might be further prejudicial to consumer interest.

11. As a matter of law, this Commission should reconsider its Order No. 5408, and grant the relief requested by Moveant, both on the grounds urged in the earlier Motion and on the grounds now given above. In so doing, an additional profit will result both in restoration of public confidence and in making the cost and burden of appeal unnecessary. The figures presented by the Company as to its financial condition clearly reveal that giving back fourteen million dollars received under the Orde complained of will not be a serious thing for the telephone company, while it would on the other hand be a vindication of the rights of the consumer."

On December 24, 1969, the Commission denied the Application for Reconsideratio stating, "The Commission has studied the Application for Reconsideration and finds no substantive reason to reconsider its prior action."

32.

The above orders are clearly erroneous.

The first main point made by the Commission is found in paragraph 4 or Order No. 5408. This point is, that the Orders were not reversed when brought here previously. This point is meaningless since it does not meet the issue in the case, which is that the Chairman should not have participat in the Orders and therefore the Orders are invalid. The second main point i found in the 5th paragraph. This point is, that one of several lawyers, namely the undersigned lawyer, knew of the circumstances now complained of, and did not bring the matter into the case soon enough. Here again the Commission is clearly in error, because the affidavits they refer to deal only with a daughter living away from home, and the real issue is that there were minors residing in the Chairman's household, and that the Chairman had patronage privileges at the Telephone Company for his friends. Moreover, the Commission ignores the affidavit of General Duke, himself a Commissioner, a the affidavits of three other attorneys who were in the Case, as a way of arriving at the result.

The 3rd point made by the Commission is that there is no authority which would justify setting aside the Orders and refunding the increases. This is clearly erroneous. As long ago as 1959, the United States Court of Appeals for the District of Columbia Circuit voided a Commission Order because of contacts out of Court, ex parte contacts, between a Commissioner and a party. Appellant has already cited Sangamon Valley Television Corporation v. United States, city as 269 F.2d 221. There are many cases on refund in this jurisdiction, including Williams v. WMATC. The Bebchick v. D.C. Transit Cases should be well known to the Commission on this point.

The final point made by the Commission is that it has reviewed the Orders and finds that they are well grounded and a cogent disposition of the issues presented. This statement is most remarkable because the Orders themselves are meaningless without the facts and witnesses which made up the Case upon which the Orders were based. This Commission is a new Commission and not one of its members sat on the old Case or heard one word of the testimony. Not one of the present members of the Commission participated in the Orders appealed from. Therefore, the final point made by the Commission has no legal meaning and is clearly error.

The Orders appealed from should be reversed, Commission Orders Nos. 4887 and 4899 should be rescinded as void, and the monies collected under those Orders should be refunded.

ARGUMENT NUMBER TWELVE: IT WAS CLEARLY ERRONEOUS FOR THE U.S. DISTRICT COURT TO FIND NO ERROR IN THE RULINGS OF PSC

If the arguments of appellant , as made above, are valid, then the District Court clearly erred in upholding the rulings of PSC which in turn denied the Motion to Rescind the Orders of PSC passed under Chairman Washington which granted telephone rate increases of $2,368,000 per annum.

CONCLUSION

While it is not clear just how much benefit, in toto, was received by the Chairman, it is much clearer what the benefits were as to C and P. The local telephone company received $2,368,000 per annum as a result of its acts, and since these acts were wrongful, the money should now be given back to the public.

It is not difficult to show that the Chairman in accepting telephone employment for three of his children and patronage privileges in the sense of referring people to the telephone company for employment, did things which, it can be argued, were clearly wrong, which were arguably contrary to the Canons, arguably contrary to the Attorney General's Report, arguably contrary to law, arguably contrary to the standards of the Interim Advisory Committee on Judicial Ethics, arguably contrary to what reasonable people would expect of a Public Service Commissioner. But, despite this, none of what he did that was wrong would have been possible if the telephone company, with a rate increase request in the immediate future, had not made it possible.

Placing blame where blame belongs therefore requires that this Court, as a matter of law, find that the rulings below were clearly erroneous, arbitrary, and capricious, and unreasonable, and moreover, since this is a tribunal with the power to set standards, reversable because the rulings below are contrary to the public interest and public policy.

Appellant therefore prays that the relevant orders be reversed, that they be declared void ab initio, and that all moneys collected thereunder, with interest added, be ordered to be returned to the public in accordance with later Orders of this Court.

Respectfully submitted,

Arthur S. Curtis

Arthur S. Curtis, Counsel
for Appellant
816 National Press Building
Washington, D. C. 20004

APPENDIX MATERIAL

ORDERS APPEALED FROM

1. Order No. 5408, PSC dated Nov. 26,1969

2. Order No. 5414 PSC dated December 24,1969

3. U.S. District Court Order June 1970, with Statement of Reasons. (Affirming PSC Orders, above.)

OTHER APPENDIX MATERIAL, AS IT APPEARS

in the pages following the above items.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

ORDER NO. 5408

November 26, 1969

IN THE MATTER OF

MOTION TO RESCIND ORDERS NOS. 4887)
AND 4899 AND FOR OTHER RELIEF) Formal Case No. 494

On September 16, 1969, the Telephone Users Association, Inc., filed with this Commission a "Motion to Rescind Orders of this Commission Nos. 4887 (Dec. 22, 1964) and 4899 (Feb. 18, 1965) and for Other Relief", together with a supporting document in the form of points and authorities.[1/]

Opposition to the above motion was filed with this Commission by The Chesapeake and Potomac Telephone Company on October 20, 1969, and on October 28, 1969, movant responded to this opposition.

Upon consideration of the motion and supporting document, the opposition thereto, and the movant's response, we have concluded that the motion to rescind should be denied.

We are dealing here with orders which have already been subjected to a searching judicial review at two levels -- in the United States District Court and in the United States Court of Appeals. Both courts have upheld the Commission's determination as lawful and correct. TUA v. PSC, 271 F. Supp. 393 (D.C.D.C. 1967), aff'd, No. 21,313, D.C. Cir., Oct. 21, 1968 (unreported), cert. den. 395 U.S. 910.

Movant now seeks to have these orders rescinded on the basis of allegations that the then Chairman of the Commission should not have participated in the decision. We are presented with sworn affidavits which indicate that movant was aware of the circumstances on which he bases this claim while the matter was still pending before the Commission.[2/] He made no motion whatever at that time, however, or at any time until the very final stage of judicial review. The authorities make it abundantly clear that we should reject such a dilatory attack on the Commission's

---

1/ The order which actually authorized an increase in rates was Order No. 4976, dated August 2, 1965. We have treated the motion as pertaining to that order.

2/ Movant denies that he learned of the circumstances on which he relies at this stage but has admitted he knew of them before the District Court had acted on review.

order. Pacheco v. People of Puerto Rico, 300 F.2d 759, 760 (1st Cir. 1962); Lucas v. United States, 325 F.2d 867 (9th Cir.1963); Kramer v. United States, 166 F.2d 515 (9th Cir. 1948); R.A. Holman & Co. v. SEC, 366 F.2d 446 (2d Cir. 1966); Converse v. Udall, 262 F. Supp. 583 (D. Ore. 1966); Bethlehem Steel Co. v. NLRB, 120 F.2d 641 (D.D.C. 1941).

Moreover, there is no authority cited to us, or of which we are aware, that would justify setting aside the orders and refunding the increases granted under the circumstances here presented. The case of Williams v. WMATC, F.2d (D.C. Cir. Nos. 20,200; 20,201; 20,202; decided October 3, 1968) relied on by movant, does not stand for any such proposition. That was a case involving substantive errors raised both before the Commission and in a timely manner on review.

In short, we are dealing here with Commission orders entered in 1964 and 1965. We have reviewed the orders and we find that they are a well-grounded and cogent disposition of the issues presented in the proceedings leading up to them. Many of the issues were resolved contrary to the position taken by the Telephone Company and the company received only a fraction of the increase it sought. The orders have been reviewed and upheld by two courts. We find no grounds for rescinding them in allegations whose basis has been known to the movant for several years.

THEREFORE, IT IS ORDERED:

That the "Motion to Rescind Orders of this Commission Nos. 4887 (Dec. 22, 1964) and 4899 (Feb. 15, 1965) and for Other Relief" filed on behalf of the Telephone Users Association, Inc., be, and it is hereby, denied.

By the Commission:

Acting Executive Secretary

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

Order No. 5414

December 24, 1969

IN THE MATTER OF	)	
	)	
Application For Reconsideration	)	
of Order No. 5408 Denying Motion	)	Formal Case No. 494
To Rescind Orders Nos. 4887 and	)	
4399 And For Other Relief.	)	

On December 19, 1969, the Telephone Users Association, Inc., filed with this Commission an Application for Reconsideration of Commission Order No. 5403 (Nov. 26, 1969). That order denied a motion to rescind Orders Nos. 4887 (Dec. 22, 1964) and 4899 (Feb. 18, 1965) issued by the Commission in Formal Case No. 494.

The Commission has studied the Application for Reconsideration and finds no substantive reason to reconsider its prior action.

THEREFORE, IT IS ORDERED:

That the Application for Reconsideration of Order No. 5403 (Nov. 26, 1969) filed on behalf of the Telephone Users Association, Inc., be, and it is hereby, denied.

A TRUE COPY:

By the Commission:

James H. Bohannan
Executive Secretary

Chief Clerk

O R D E R

This cause having come on to be heard on June 5, 1970, on the motion to dismiss filed by the Public Service Commission and The Chesapeake and Potomac Telephone Company and on the motion for judgment on the pleadings filed by The Telephone Users Association, Inc., and upon consideration of the oral argument in open court by counsel for all parties, together with the pleadings and papers filed herein, and after a review of the entire record,

THE COURT FINDS AND CONCLUDES, as is more fully set forth in the Statement of Reasons accompanying this order as required by 43 D.C. Code § 705, that the findings of fact of the Public Service Commission in the orders presently at issue were not unreasonable, arbitrary or capricious, and that appellant was not prejudiced by any errors of law contained therein. Wherefore, for the reasons stated, it is this ____ day of June, 1970,

ADJUDGED AND ORDERED:

1. That the motions to dismiss filed by the Public Service Commission of the District of Columbia and The Chesapeake and Potomac Telephone Company be and the same are hereby granted;

2. That the motion for judgment on the pleadings filed by The Telephone Users Association be and the same is hereby denied.

_____
JUDGE

STATEMENT OF REASONS

This appeal has been taken by The Telephone Users Association, Inc. ("TUA"), pursuant to D.C. Code § 43-705, to review orders of the District of Columbia Public Service Commission ("Commission") entered on November 26 and December 24, 1969. The November 26 order denied a motion made by TUA requesting the Commission inter alia "to rescind" rate orders made by it in 1964 and 1965 which granted The Chesapeake & Potomac Telephone Company ("Company") increases in local telephone rates. The December 24 order denied TUA's application for reconsideration of the denial of its motion to rescind.

The 1964 and 1965 rate orders in question were issued in the course of a single rate proceeding initiated in 1963. In 1964 and 1965 the Commission held extensive hearings in which the General Services Administration and the Commission staff participated. The TUA and its present counsel also participated in the hearings. The Commission ultimately determined on the basis of detailed findings the level of rates to be authorized, and new rate schedules approved by the Commission became effective on August 7, 1965.

The TUA and its counsel appealed the Commission's rate orders to the District Court which affirmed the orders. Telephone Users' Ass'n, Inc. v. PSC, 271 F. Supp. 393 (D.D.C. 1967). TUA next appealed this affirmance to the Court of Appeals

for the District of Columbia Circuit, and in an unreported per curiam opinion filed on October 21, 1968, that Court affirmed the District Court. On March 5, 1969, TUA filed in the Supreme Court of the United States a petition for writ of certiorari. While its petition for certiorari was pending, TUA on May 9, 1969, filed a motion to remand the case on the ground that a former member of the Commission, who had served as its Chairman at the time of the 1964 and 1965 rate proceeding, was disqualified from sitting in that proceeding. The Supreme Court denied TUA's petition for certiorari and its motion to remand. 395 U.S. 910, 987 (1969).

On September 5, 1969, TUA filed with the Commission its motion to rescind the rate orders based upon essentially the same charge of disqualification it had presented to the Supreme Court. The motion to rescind, like the motion to remand presented to the Supreme Court, was opposed by the Company. The Commission thereafter denied TUA's motion to rescind and entered the orders now sought to be reviewed. In its decision, the Commission stated that under the applicable precedents TUA's motion to rescind must be rejected as "dilatory"; the opinion noted, among other points, that TUA's counsel himself admitted that he had learned of the circumstances on which he relied in his motion to rescind when the rate orders were before the District Court, although he concededly failed to raise the disqualification objection there or in the Court of Appeals while the rate orders were under judicial review.

The Commission also stated that it knew of no authority which would justify the relief sought "under the circumstances here presented." Finally the Commission's opinion declared that the present Commission had reviewed the 1964 and 1965 rate orders and found them a "well-grounded and cogent disposition of the issues presented" in the rate proceeding. It pointed out in this regard that many of the issues in the rate proceeding had been resolved adversely to the Company, that the Company had received "only a fraction" of the rate increase it sought, and that the rate orders had been reviewed and upheld by two courts.

Following TUA's instant appeal from the Commission's denial of its motion to rescind, both the Commission and the Company -- an intervenor in the appeal -- filed motions to dismiss the appeal and affirm the orders of the Commission. TUA opposed those motions and filed a motion of its own for judgment on the pleadings which has in turn been opposed. The procedure governing the appeal is specified in D.C. Code § 43-705.

The Commission had before it all of the contentions that are made in this Court. As to the facts, the Commission had an opportunity to review them, and its findings of fact are based upon substantial evidence. The governing rules of law do not really appear to be in dispute. Whether or not there was improper prejudice or conflict of interest on the part of the Commission essentially turns upon the facts. On the merits of the case there has been full opportunity for judicial review.

Under all the circumstances, the findings and conclusion of the Commission should not be disturbed. The motions to dismiss on the part of the Commission and the intervenor are granted and the motion by TUA for judgment on the pleadings is denied.

Appendices — p1

AFFIDAVIT OF FORMER PUBLIC SERVICE COMMISSIONER

1. The under signed states that the following is true to his best knowledge and belief:

a) That he was a Public Service Commissioner in the District of Columbia during the Telephone Rate case, 1963-5;

b) That at no time was he informed nor did he know, during the rate case, that James A. Washington, Jr., the Chairman, had three children working for C. and P. (D.C.) while he was Chairman of P.S.C.;

c) That at no time did he know, nor was he informed, during the rate hearings, that the said Chairman Washington had at least two children, one of whom was a minor residing in the Chairman's household, employed by C. and P. (D.C.) while he was hearing the telephone rate case.

C. Dunbar Lockwood

Subscribed and sworn to before me this 21st day of October 1969.
My commission expires: 3/30/71

Jerome S. Heller Notary Public

JEROME S. HELLER
NOTARY PUBLIC, STATE OF NEW YORK
No. 52-1753455
Qualified in New York County
Commission Expires March 30, 1971

Exhibit A

THE COMMONWEALTH O. MASSACHUSETTS

DEPARTMENT OF THE ATTORNEY GENERAL

STATE HOUSE • BOSTON 02133

p. 2

ROBERT H. QUINN
ATTORNEY GENERAL

October 15, 1969

VIA AIR MAIL

Arthur S. Curtis, Esquire
816 National Press Building
Washington, D. C. 20004

Dear Mr. Curtis:

Enclosed are an original and one copy of my Affidavit which we discussed by telephone this morning.

Yours very truly,

Walter H. Mayo III

WALTER H. MAYO III
Assistant Attorney General

WHM:AMJ
Enclosures (2)

B Exhibits Page 1

Appendix

C.I.L. 10M-2-67-944547

The Commonwealth of Massachusetts

[redacted]
Secretary of the Commonwealth

K 9763

Boston, October 15, 19 69

I hereby certify. *That at the date of the attestation hereto annexed*

Russell F. Landergan

whose name is signed to the attached certificate of acknowledgment, proof or affidavit, was at the time of taking such acknowledgment, proof or affidavit, a NOTARY PUBLIC for the said Commonwealth duly commissioned and sworn; that to his acts and attestations as such, full faith and credit are and ought to be given in and out of court; that as such Notary Public he was by law authorized to take the same, to take depositions, to administer oaths and take acknowledgments of deeds or conveyances of lands, tenements or hereditaments and other instruments throughout the Commonwealth to be recorded according to law; that I have compared his signature to the annexed attestation with the original on file in this office, and verily believe it to be genuine. I further certify that the impressions of the seals of Notaries Public are not required by law to be filed in this office.

In testimony of which, *I have hereunto affixed the*

Great Seal of the Commonwealth

the date above written.

John F. X. Davoni

[redacted]
Secretary of the Commonwealth

SUFFOLK, SS.

p.4

WALTER H. MAYO III, being first duly sworn, deposes and says:

(1) That he was a resident of the District of Columbia from March 1963 to August 1967;

(2) That he intervened in the proceedings before the Public Service Commission of the District of Columbia with respect to the Application of the Chesapeake and Potomac Telephone Company to increase its rates and participated in those proceedings from 1963 through 1965;

(3) That during those proceedings one James A. Washington, Jr. was Chairman of the Public Service Commission;

(4) That at no time prior to, during or after those proceedings was your affiant advised that three of Mr. Washington's children were employed by the Chesapeake and Potomac Telephone Co. nor was your affiant advised that a minor child of Mr. Washington who resided in the latter's home was employed by the Chesapeake and Potomac Telephone Company;

(5) That, since September 1967, your affiant has held the position of Assistant Attorney General of the Commonwealth of Massachusetts, in which position he has supervised all litigation with respect to public utilities in which the Commonwealth is an interested party;

(6) That, in your affiant's professional opinion, the circumstances that children of James A. Washington, Jr., and more particularly a minor child residing within his household, were employed by the Chesapeake and Potomac Telephone Company was

grounds for disqualification of James A. Washington, Jr. from hearing or deciding the application of the Chesapeake and Potomac Telephone Company for an increase in its rates;

(7) That, in your affiant's professional opinion, the failure of James A. Washington, Jr. to disclose the facts stated in paragraph (4) supra prior to or during the proceedings before the Public Service Commission was grossly improper and rendered all proceedings before said Commission invalid and illegal;

(8) That, had your affiant been aware of the facts stated in paragraph (4) supra, he would have moved to have the said James A. Washington, Jr. disqualified from hearing or deciding the application of the Chesapeake and Potomac Telephone Company for an increase in its rates.

Walter H. Mayo III

Walter H. Mayo III

SWORN TO and SUBSCRIBED,
before me, on this 15th day
of October, 1969:

Russell F. Landrigan

Russell F. Landrigan
Notary Public, Commonwealth of Massachusetts
My commission expires: June 4, 1971

Exhibit B - p.3

p.6

AFFIDAVIT OF COUNSEL

THE UNDERSIGNED COUNSEL HEREBY STATES UNDER OATH THAT THE FOLLOWING IS TRUE TO HIS BEST KNOWLEDGE AND BELIEF:

1. That he was counsel for the Telephone Users Aseociation, Inc., a non profit association in the District of Columbia, and others similarly situated, including himself as a telephone user, during the telephone rate hearing, 1964 and 1965; and that he took the case to the Supreme Court later because he did not feel that the rulings in the case, particularly the procedural rulings, were in according with the law'

2. That at no time during these hearings before Chairman Washington did the undersigned learna that the Chairman had three children working for C and P. Telephone Company, Inc. while he was Chairman; and that it was not until undersigned's motion for disclosure during certiorari procedure that he learned, on affidavit from Chairman Washington, that the Chairman had, while hearing the telephone rate case, at least one minor child residing in his own household, who was employed by the telephone company of D.C.

3. That the undersigned has brought this case back to the Public Service Commission for the reason that this Commission has never had this matter of recission of the rate increases of $2,368,000 per annum before it, on the grounds stated above, and that therefore it is now necessary to get an administrative ruling on the points of law involved before the case can be brought back through the appellate channels, assuming that the Telephone Company refuses to pay back the increases granted by the said James A. Washington, Jr.

4. That he the undersigned known from any source that the Chairman had three children employed by the telephone company while he was Chairman, the undersigned counsel would have moved to disqualify the said Chairman Washington from hearing the case, and failing this, would have sought a federal injunction and sent copies of his application for injunction to members of the District Committee so that these governing authorities would be apprised of what was transpiring.

Respectfully submitted,

Arthur S. Curtis

Arthur S. Curtis, Attorney
816 National Press Bldg.
Washington, D.C.
Counsel for the Telephone Users Assn., Inc.

Subscribed and sworn to before me this 7th day of October 1969.
My commission expires [illegible]

Notary Public [illegible]

B Exhibits Page 4

p.7

AFFIDAVIT OF COUNSEL

THE UNDERSIGNED HEREBY STATES UNDER OATH AS FOLLOWS:

1. That he was an attorney ~~on the part of the general public,~~ during the Telephone Rate Case, 1963-5, before the Public Service Commission of the District of Columbia, while James A. Washington, Jr. was Chairman of said Commission.

2. That at no time was he told, nor did he learn, that three children of the Chairman (Washington) had been given employment by C. and P. Telephone Company(D.C.) while the said James A. Washington, Jr. was Chairman of the Public Service Commission.

3. That at no time was he told, nor did he learn, that while the rate case hearings were going on, a minor child of the said Chairman Washington, residing in the home of the said Chairman, was employed by C. and P. Telephone Co.(D.C.)

Date: October 2c, 1969

Subscribed and sworn to before me this 30th day of Oct., 1969.
My commission expires [illegible]

Notary Public.

P Exhibit Page 5

p. 8

AFFIDAVIT OF COUNSEL

THE UNDERSIGNED HEREBY STATES UNDER OATH AS FOLLOWS;

1. That he represented the D.C. Federation of Citizens' Associations during the Telephone Rate Case, 1963-~~4~~, before the Public Service Commission of the District of Columbia, while James A. Washington, Jr., was Chairman of the Public Service Commission.

2. That at no time was he told, or did he learn, that three children of the Chairman had been given employment by C and P (D.C.) while he was Chairman;

3. That at no time was he told, or did he learn, that while the rate case hearings were going on, a minor child of the Chairman, residing in the home of the Chairman, was employed by C. and P. (D.C.) Telephone Co., Ic.

Charles Bechhoefer
Charles Bechhoefer

Subscribed and sworn to before me this 14 day of October 1969. My commission expires : 7/1/70

Vivian A. C. Kemp Notary Public

B Exhibits Page 6

PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA
CAFRITZ BUILDING
1625 I Street, Northwest
WASHINGTON, D.C. 20006

Ap. 9

November 25, 1969

The Honorable Dean Burch, Chairman
Federal Communications Commission
1919 M Street, Northwest
Washington, D. C. 20554

Dear Chairman Burch:

We on the District of Columbia Public Service Commission would like to join with the other state commissions in protesting the action of the Federal Communications Commission in reducing interstate telephone rates by $150,000,000 effective January 1, 1970.

This Commission has before it an application for increased rates in which The Chesapeake and Potomac Telephone Company, a wholly-owned subsidiary of American Telephone and Telegraph Company, is seeking an increase in intra-District rates of approximately $13,000,000. As you know, there are approximately fifteen other proceedings pending before various state commissions in which increases in local rates of about $500,000,000 are being sought. Some of these applications for increases have been acted on favorably by state commissions, including, most recently, the Maryland Commission. It is perfectly apparent, therefore, that it is AT&T's contention that their company, on an overall basis, requires not less, but more revenue than present rates produce.

If this contention is valid, then the FCC's action in unilaterally reducing the company's interstate revenue seems highly questionable. The toll rate reductions which your Commission has authorized will benefit a relatively small and largely affluent class of customers — a class, moreover, which has received many other toll rate reductions in recent years and which presently enjoys very low

rates for toll service. Meanwhile, the local customer, a much larger group, is facing the prospect of significant increases in the charges for his basic telephone service -- an increase which many local users can ill-afford.

We strongly suggest that interstate rates should not be reduced without thorough consideration, in concert with the state commissions, of the question whether, if AT&T does need additional revenues on an overall basis, all or some portion of those revenues should not be produced through maintaining interstate toll rates at their present levels. The means for achieving this result exists, through revision in the separations procedures which would shift additional portions of the plant and revenue requirements onto the interstate side of the equation.

We believe that sound regulation in the public interest requires that the toll rate question be considered in the broad terms outlined above. The FCC's action in reducing rates without considering the question in these terms is not in the best interest of the rate-paying public as a whole and we strongly urge you to reconsider your decision.

Very truly yours,

George A. Avery
Chairman

BEFORE THE PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF
THE APPLICATION OF C AND P TELEPHONE CO(D.C.)

FORMAL CASE NO. 5 3 8

A.

MOTION TO DISQUALIFY MEMBERS OF THIS COMMISSION FROM PROCEEDING FURTHER WITH THIS CASE.

B.
MOTION TO DISMISS THIS CASE.

A.

The Telephone Users Association, Inc., a non profit association organized in the District of Columbia in 1963, for itself an others similarly situated respectfully moves this Commission to disqualify itself from further hearing this case, and in support of this Motion states as follows:

1) That Congress has by statute created this Commission and has made it responsible for holding formal hearings and setting just and reasonable telephone rates. See Title 43, D.C. Code.

2) That the jurisdiction of this Commission extends to the political boundaries of the District of Columbia and is therefore intrastate only.

3)That in performing its rate making functions, this Commission balances the investor interest against confiscation and the consumer interest against exorbitant rates, Washington Gas Light Co. v Baker(1951,188 F 2d 11, 88 U.S. App. D.C. 115), and that the parties before it in this proceeding are the stockholders as represented by the Company and the consumers as represented by the Telephone Users Association, Inc. and G.S.A.

4) That of necessity, to arrive at "reasonable, just, and non-discriminatory" rates as required by 43-3o1, D.C. Code, the Commissioners must be at all times

p. 12

Be completely impartial and neutral.

5) That 43-201, D.C. Code, states as follows:

" No person shall be eligible to the office of commissioner of said Public Utilities Commission who is, or who shall been during a period of five years next preceding his appointment, directly or indirectly interested in any public utility operating, owning, or having an interest in property in the District of Columbia; or in any stock, bond,mortgage, security, or contract of such public utility. If any such commissioner shall voluntarily become so interested, his office shall ipso facto become vacant; and if any such commissioner shall become so interested otherwise than voluntarily he shall, within a reasonable time, divest himself of such interest, and if he fails to do so his office has become vacant."

And, that the purpose of 43-201 as just quoted is to set the policy of neutrality and impartiality on the part of each Commissioner.

6) That the same stockholders who are a party before this Commission in this case have had a telephone rate case going before the Federal Communications Commission in the matter of interstate (long distance) rates; that the same consumer representative that appears here, Telephone Users Association,Inc., filed papers as an intervenor in that case, in the interest of lower long distance rates.

7) That in the Federal Communications Commission proceeding, following years of fact finding, the stockholders were ordered by F.C.C. to decrease the rates by approximately $150,000,000. per year; that the undersigned intervenor believes the reduction was proper but not enough; that the stockholders, who appear here as C and P Telephone Co(D.C.) and as A.T. and T. before F.C.C.,

objected to the order decreasing telephone rates in the interstate area.See A,attached.

8) That on 26 November 1969, this Commission by its Commissioners communicated with F.C.C. by letter, which is quoted in Exhibit B, and argued in the letter the stockholders' position or side of the case, and requested that the F.C.C. not reduce the long distance rates; and that the gist of the argument was that long distance rates was somehow related to local rates.

9) That this Commission has never permitted this intervenor to have the figures on how much money goes to the holding company from a long distance dollar of a local consumer; and that in a paper filed December 4,1969, the stockholders, in presenting an alleged statement of receipts by the holding company from its wholly owned local subsidiary, stated:

> "As indicated at the top of page 50 of Form M, revenues shown in the "Interstate and Foreign" column are as received under the Division of Revenues Contracts. Interstate and Foreign Revenues are of course outside the jurisdiction of the Commission."

10) That by its letter of 26 November 1969, this Commission in fact argued in another tribunal the case of the stockholders against lower rates, even though interstate rates are no concern of this Commission; and that such argument can be viewed as a departure from its statuatory duties.

11) That this Commission, in taking a position before F.C.C. either for or against any party, in fact became an advocate.

12) That in becoming an advocate, this Commission abandoned its position of neutrality as between consumer and stockholder, and acquired an interest in the case of the telephone company; and that it is arguable that the interest falls within the intent of 43-201.

13) That in abandoning its position of necessary neutrality, the Commission and its commissioners became at once disqualified from further hearing

this case, if in fact their offices did not ipso facto become vacant.

14) That in any case, this Commission and its Commissioners should disqualify itself and themselves from further hearing this case.

B.

MOTION TO DISMISS THESE PROCEEDINGS

1) Intervenor adopts 1-14 of the above part A.

2) In view of 1-14, these proceedings should be dismissed, since there are no longer available to hear the whole hearing Commissioners who are completely neutral in the matter of the contest over rates between the telephone stockholder and the telephone consumer, it is herewith respectfully argued.

Respectfully submitted.

A S Curtis

Arthur S. Curtis, counsel

Telephone Users Association, Inc.

816 National Press Bldg. D.C. 20004

Certificate: I have this 8th day of December 1969 delivered by hand copies of this Motion to counsel for G.S.A. and C and P Tel. Co., Inc.

A S Curtis

Arthur S. Curtis, Counsel

p. 15

ARTHUR S. CURTIS
ATTORNEY AND COUNSELLOR AT LAW

NATIONAL 8-5697

CABLE ADDRESS
WASHASCURTIS

NATIONAL PRESS BUILDING
WASHINGTON 20004, D. C.

The Honorable Dean Burch
Chairman, F.C.C.
Washington,D.C.

Dear Chairman Burch:

I have just read the letter from the P.S.C. of D.C., requesting that you rescind your order cutting long distance rates by $150,000,000. I have also taken a poll, in my capacity as counsel for the TELEPHONE USERS ASSOCIATION, INC. My own long distance bill has been running about $50. to $100. per month or thereabouts.

First, let me say that I do not agree with the position stated in the letter of 25 Nov.1969 from the PSC of D.C. I believe that the cut in rates of $150,000,000 is in fact not a big enough cut. Secondly, I do not see any connection between a cut in my long distance rates and my local rates. Third, I do not believe that it would be wise to say to you, don't cut my rates now; let's see if PSC will cut my local rates. The bird in the hand is still worth anything that lurks in the bush.

Further, I have taken a poll of a number of people and all of them affirm your decision to cut long distance rates. Not one is willing to have you recall your order and leave it to the local commissions to see if rates should be cut. Here are some questions and some of the answers:

QUESTION: THE FEDERAL COMMUNICATIONS COMMISSION HAS ORDERED A.T.&.T.TO CUT ITS LONG DISTANCE RATES. Please comment on this.

Typican Answer: I BELIEVE IT WILL BE NICE IF MORE PEOPLE LIKE MYSELF CAN CALL HOME MORE OFTEN. SO YOU'LL BE SPENDING MORE MONEY IN THE LONG RUN, THE WAY I LOOK AT IT. I'LL BE CALLING DALLAS, TEXAS MORE OFTEN." Mrs. Lelia Braun,1818 23rd S.E. D.C.

Answer: I'D BE IN FAVOR OF IT. (Frank K---.)

Answer: I THINK THAT'S A VERY GOOD THING. SOME PEOPLE DON!T MAKE MANY LONG DISTANCE CALLS. BUT PEOPLE WHO USE THE PHONE, IT WILL MAKE A LOT OF DIFFERENCE TO THEM." Mr. E----

Answer: THAT'S GOOD. Essie Martin, 33 Q St N.E., D.C.

: I THINK THEY SHOULD BE. Verlando Henry, 1220 C S E, D.C.

: " As a consumer, I'm for it." Sam F---.

: " As a consumer, I'm generally in favof of lower rates. I see no reason especially for A T & T to be an exception." S------

QUESTION: DO YOU BELIEVE F.C.C. SHOULD WITHHOLD OR RECALL ITS CUT IN LONG DISTANCE RATES TO GIVE THE LOCAL COMMISSIONS A CHANCE TO CUT THE RATES?

ANSWER: "I DO NOT THINK A LOCAL REGULATORY BODY CAN BE TRUSTED TO REDUCE ITS RATES FOR ONE MINUTE BECAUSE THE F.C.C. WITHHOLDS ITS RATE CUT. I DON'T TRUST LOCAL REGULATORY BODIES." S_____ (OVER

ANSWER: " IT IS COMPLETELY IMPRACTICAL TO SUPPOSE THAT LOCAL COMMISSIONERS WOULD CUT THEIR RATES." SAM F---.

: "Give me the bird in the hand."

QUESTION: CAN I QUOTE YOUR NAMES ON THE LAST QUESTION?

Answer: "They would take out my phones."

On the basis of the above, which is typical of the more extensive sampling which was taken, I must state, with due respect to the Public Service Commission, that I found no person questioned who sided with the PSC, whereas all persons questioned sided with you as far as cutting the long distance rates were concerned.

Therefore, I trust you will, in the first instance, inquire of the persons who have written in from the various state commissions, seeking information whether any of these were inspired directly or indirectly by the telephone company or companies, and if so, under what inducement; and I hope that you will make your findings public on this point.

Secondly, I hope that you will cut the long distance rates as suggested, and make further studies which will lead to further cuts in the near future.

In conclusion, therefore, I must state, with all due respect to the Public Service Commission of the District of Columbia, that it does not speak for me in the above matter, nor does it speak for any of the persons whom I interviewed.

Arthur S. Curtis, acting president
Telephone Users Association, Inc.
816 National Press Bldg. D.C. 20004

9 December 1969

AT&T Seeks to Keep $167 Million Extra Profits

By Don Oberdorfer
Washington Post Staff Writer

The American Telephone nd Telegraph Company has ade or is making at least 167 million more from its ng" distance charges in 1968 nd 1969 than the Federal mmunications Commission s allowed as a "fair rate of turn," FCC testimony dis-osed last week.

In four days of closed-door iscussions with officials of T&T, the FCC Commission-rs have been examining the easons for the surge of extra rofits and pondering whether order the telephone company o reduce its long distance ates.

AT&T has a different plan. fficials of the Bell system y the additional profits are needed to meet higher capital costs and pay higher dividends to stockholders. Instead of reducing rates, they want the FCC to authorize a 20 per cent increase in the allowable rate of return—which would make the present earnings appear to be too small rather than too large.

Each Has a Stake

No increase in long distance telephone rates is contemplated in any case. Because of the constantly rising volume of calls and economies of technology, costs per call have been dropping for many years. The issue now is how much of this economy should be shared with telephone users in the form of rate cuts, and how much should go to AT&T's coffers for shareholders bondholders on investment and other uses.

Every family with a telephone, as well as the 942,000 Bell system employees and 3.1 million stockholders, has a stake in the outcome, and in the FCC's regulation of AT&T —which is the nation's largest corporation and the largest regulated monopoly.

Yet outside of financial and communications circles, very little interest has been shown in the current discussions around the u-shaped table at the FCC's modernistic new headquarters.

The statistics are dull and the arguments around the table often abstruse, but the underlying issues are not. Stenographic transcripts of the discussions—made available to outsiders the day after each hearing—show that the FCC and the AT&T are exploring the basic philosophy of rate regulation as well as the ultimate disposition of the many millions of dollars in earnings generated from long distance charges to the telephoning public.

Under the Communications Act of 1934, the FCC is charged with regulating interste and foreign communications to make available to the people efficient wire and radio communications "with adequate facilities and reasonable charges." Because of AT&T's monoply on long distance telephone service, government rate regulation is necessary in the public interest.

For most of its history, the FCC has been forced by lack

onnel to do this job al- the dark. Until a few ago the agency had een able to undertake us study of the economic telephone company, ly its telephone regu- taff of 40 (including six ists) is handicapped in with the many ds of Bell system eco- rts and its hundreds consultants.

n 1967

as a result of the -scale telephone rate tion in FCC history, mission ordered AT&T e long distance rates million and ruled that hone company could 7.5 per cent annually ir rate of return" on tment. The company had been making more than 7.5 per cent annually for 10 of the 12 years prior to the ruling, according to data made public at the time.

In response to legal action filed by the telephone company, the FCC lowered the amount of the reduction it had ordered to $75 million. Moreover, it stated that "these figures (7 to 7.5 per cent) do not respresent either an absolute floor or ceiling, but are subject to revision as circumstances warrant." The FCC said it would take another look at AT&T whenever earnings deviated from the allowed percentages.

According to AT&T testimony last week, its earnings quickly exceeded 7.5 per cent. In 1968, the company made 7.6 per cent on its interstate investment. This year, AT&T estimates it will earn 8.1

Because the telephone system is so vast, extra earnings of only one-tenth of one per cent of inteterstate investment is roughly $24 million. According to calculations by officials of FCC's Common Carrier Bureau, the telephone company's return above and beyond the authorized 7.5 per cent for 1968 and 1969 is at least $167 million—taking the highest earnings rate allowed and the lowest estimate of the actual AT&T earnings.

The FCC staff estimates that the true figure for long distance earnings this year will be 8.25 per cent. If so, the total earnings in excess of 7.5 per cent for the two years would be $203 million.

No Return Considered

AT&T officials testified last week that company earnings will probably soar to 8.5 to 9 per cent next year unless there is a reduction in telephone rates. And instead of a reduction, the AT&T is asking that the FCC increase its allowed rate of return to 8.5-9 per cent, matching the expected revenue.

The FCC is not considering any plan to return to the public the extra money earned by AT&T above and beyond the 7.5 per cent allowed in the 1967 decision. The commission considers the extra earnings "over the dam" and thus beyond recall.

John D. DeButts, vice chairman of the board of AT&T, told the FCC last week that "we believe a higher level of earnings is necessary to assure that our network grows ever more useful to the public and ever more efficient in its operations."

To arguments that the FCC might better protect the public by ordering a reduction in telephone rates and thus a more modest rate of return for AT&T, DeButts had a ready answer—his own definition of how the FCC should work.

"The commission serves the public interest, not so much by the rigor of its constraints on current rate levels," he told the FCC commissioners last week, "as by the degree of its effectiveness in establishing conditions—including allowable earnings levels—that will sustain the communications industry's ability to provide the public with the best service at the most reasonable rates over the long term."

+B

P1 - Wash. Post - Nov 6, 1969

Interstate Telephone Rates to Be Cut in '70

By Robert Samuelson
Washington Post Staff Writer

he Federal Communica- Commission and the erican Telephone and Tele- h Company announced erday that interstate e rates will be reduced by y $240 million early next

he changes, the first since s were cut by $120 million 967, resulted from a series eetings between the FCC and the phone company. t the same time, the FCC wed the company to make igher return on its invest- t in interstate phone facil- Under a 1967 ruling, the mission permitted AT&T its between 7 and 7.5 per of its investment, but yes- ay's decision could result least temporarily in a rn of 8-to-8.5 per cent.

The FCC decision was taken on a 5-to-1 vote.

The paradox of AT&T's profits rising while its charges to consumers fall results from improved technology, which has allowed AT&T to accommodate more calls in microwave and cable facilities. Consequently, the phone company's unit costs have declined, and other increasing expenses, such as rising wages, have been offset.

Reductions in interstate charges have been the rule, not the exception, over the last 20 years. According to AT&T, interstate phone rates have declined 20 per cent since 1940, although the general consumer price index has risen 140 per cent.

The question always before the FCC is how much of the savings should be passed onto the consumer in lower rates and how much to the company in higher profits.

Commissioner Nicholas Johnson, in a dissent from the majority opinion, stated that the commission should have required cuts greater by at least $50 million and perhaps $200 million.

The National Association of State Regulatory Commissions —the state agencies which regulate local AT&T affiliate companies and set phone rates for calls within states—insisted the FCC should have acted to reduce the charges for local, not interstate, service.

In monitoring AT&T, the FCC attempts to restrict the amount of profit the company makes on its total interstate investment. In 1967, after lengthy hearings, the commission said that the phone company could make between 7 to 7.5 per cent.

The present round of informal talks began when AT&T reported that it would make in excess of 8 per cent this year.

AT&T contended that a higher rate of return was required to assure continued interest on the part of investors in company securities—needed to raise the billions of dollars AT&T spends annually to expand its facilities. Last year, the company's construction program passed $5 billion, $2 billion of which had to be raised from outside sources.

The company asked that its allowable rate of return be set between 8.5 and 9 per cent, on the grounds that rising interest rates made the 1967 decision obsolete.

In yesterday's announcement, the FCC did not go as far as the company requested. Nevertheless, the announced reductions in interstate phone charges would still allow AT&T to make between 8 and 8.5 per cent on its interstate investment.

It was this decision that Johnson attacked. Had the FCC adhered strictly to its 1967 guidelines, he said, there could have been further reductions between $50 and $200 million.

The majority has yet to issue its full opinion, and no response to Johnson was offered yesterday. However, at a press briefing, Bernard Strassburg, chief of the FCC's Common Carrier Bureau, noted that the FCC is empowered to order AT&T to reduce rates only after lengthy hearings and extensive investigations.

Of the $240 million in reduced charges, about $150 million results from a review of the company's interstate earnings. The rest reflects compensating reductions the company promised in return for higher rates for specialized services, including those offered to t' vision newworks.

The FCC could have reduced interstate earnings without ordering actual price cuts. In effect, it could have ordered the phone company to count some of its investment in facilities for local service as part of its interstate rate base.

That change would have reduced the rate base for local phone service and would, therefore, have relieved some of the pressure on state utility commissions to grant price increases to local phone companies.

D.C. Star, Nov. 14, 1969

PSC Protests Lower Interstate Phone Rates

The District Public Service ... many jurisdictions, including ... Commission has joined other ... District. ... state regulatory agencies in pro- ... Interstate toll rates have ... testing plans of the Federal ... going down because of increas... Communications Commission to ... efficiency of long-distance tel... reduce interstate telephone ... phone operations. But the FC... rates on Jan. 1 by $120 million. ... now has under consideration ... In a letter sent yesterday to ... request by the Chesapeake a... Dean Burch, FCC chairman, ... Potomac Telephone Co. for a $... PSC Chairman George A. Avery ... million increase in local rate... said the federal agency's action ... The PSC and other state co... comes at a time when the Amer- ... missioners are protesting th... ican Telephone and Telegraph ... reduction of the interstate rev... Co. through its subsidiaries is ... nues will benefit ... "a relative... seeking local rate increases in ... small and affluent class of cu... ... tomers," who can afford to ma... ... long-distance calls.

... Meanwhile, the PSC claim... the local customer with less f... nancial means to take advan... tage of lower inter-state rates ... facing the prospect of significant ... increases in local charges for b... basic telephone service.

... Avery went on to say th... "sound regulation in the publi... interest" requires that the to... rate question be considered b... examining the question ... whether some of the revenue i... crease can be obtained b... maintaining long-distance rat... at the present scale.

PG

EXHIBIT A + B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,571

TELEPHONE USERS ASS'N, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY

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Of Counsel

December 9, 1970

Washington, D. C. · THIEL PRESS 202 · 393-0625

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*Cases principally relied upon are marked with an asterisk.

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STATUTES

MISCELLANEOUS

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY

ISSUE PRESENTED

Whether the Public Service Commission of the District of Columbia erred in denying a motion filed by appellant in 1969 alleging that the Chairman of the Commission was disqualified from participating in a rate proceeding that terminated in 1965 and, on that ground, requesting that the Commission (1) rescind two orders made in that proceeding authorizing the Chesapeake and Potomac Telephone Company to increase its rates and (2) require the Company to refund the difference between the increased rates authorized and the rates formerly in effect.*

*This case has previously been before the Court on review of the merits of the Commission's orders; on October 21, 1968, the Court

COUNTERSTATEMENT OF THE CASE

This is an appeal by the Telephone Users Ass'n, Inc. ("Association") from a decision (A. 20-24) of the District Court of the District of Columbia dismissing on the merits a suit by the Association to review orders (A. 17-19) of the Public Service Commission of the District of Columbia ("Commission").[1] The orders of the Commission sought to be reviewed rejected a motion by the Association requesting that the Commission reopen a rate proceeding that had finally determined rates for the Chesapeake and Potomac Telephone Company ("Company").

Between 1963 and 1965 the Commission held extensive hearings on a petition of the Company seeking authority to increase its rates for telephone service in the District of Columbia.[2] As a result of the hearings the Commission issued several orders—including Order No. 4887, Dec. 22, 1964 (57 P.U.R. 3d 1) and Order No. 4899, Feb. 18, 1965 (unreported)—which collectively authorized the Company to put into effect a schedule of rates designed to produce annually increased gross revenues in the amount of approximately $2,346,000.[3] The increased rates became effective

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affirmed the judgment of the District Court sustaining the Commission's orders. Telephone Users Ass'n v. Public Serv. Comm'n, Nos. 21,318-19, D.C. Cir. (unreported per curiam opinion).

[1] References designated "A. ___" are to the separate appendix prepared by appellees.

[2] In the Matter of Application of the Chesapeake and Potomac Telephone Company, Formal Case No. 494. The record in the rate proceeding contains more than 100 exhibits and more than 5,000 pages of testimony. There were 41 days of hearings; 22 witnesses appeared; there were several oral arguments; and the Commission received voluminous briefs and memoranda of law from the parties. The Commission said: "This probably has been the most extensive rate case ever conducted by this Commission." Order No. 4887, Dec. 22, 1964, p.1 (57 P.U.R. 3d at 4).

[3] The Company had asked the Commission to approve rate changes which would have produced more than $10,500,000 in additional gross annual revenue and which would have yielded a return of 8%

on August 7, 1965, after allocation of the increase to different telephone services. Order No. 4976, Aug. 2, 1965 (unreported).

The appellant Association, which is alleged to represent telephone users of the District of Columbia, was one of several parties intervening in the Commission hearings in opposition to the rate increase proposed by the Company. Arthur S. Curtis, counsel for the Association in all proceedings here relevant, is a member of it but it is uncertain what other persons comprise the Association. The Association and Mr. Curtis were the only parties to the rate proceeding before the Commission who sought judicial review of the Commission's rate orders.

Pursuant to the provisions of D.C. Code Sec. 43-705 (1967), the Association and Mr. Curtis appealed the Commission's rate orders to the District Court alleging that in authorizing the rate increase the Commission had erred in various respects. The District Court on June 5, 1967, sustained the Commission's orders.[4] The Association appealed the District Court decision to this Court which affirmed the District Court *per curiam* on October 21, 1968.[5] The Association filed a petition for a writ of certiorari in the United States Supreme Court on March 5, 1969.

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on intrastate investment. The smaller increase authorized by the Commission was designed to produce a return on the intrastate investment of 6.25%—the rate of return that had been urged by the General Services Administration which had intervened in the proceeding in its capacity as a consumer of telephone service. An expert whose testimony was presented by the staff of the Commission testified that in his opinion 6.25% to 6.50% represented a fair return to the Company. See Order No. 4887, Dec. 22, 1964, pp. 28, 33, 36, 41 (57 P.U.R. 3d at 36, 38-40).

[4]Telephone Users Ass'n v. Public Serv. Comm'n, 271 F. Supp. 393 (D.D.C. 1967).

[5]Telephone Users Ass'n v. Public Serv. Comm'n, Nos. 21,318-19, D.C. Cir., Oct. 21, 1968 (unreported opinion).

On May 9, 1969, while the petition for a writ of certiorari was still pending, the Association filed a motion to remand the case based on alleged "newly discovered evidence" that the Chairman of the Commission, Mr. James A. Washington, Jr., was disqualified because at the time of the rate proceeding he had referred persons for employment with the Company and that a child or children of Mr. Washington had been employed by the Company during that period. On this ground the motion alleged that the rate proceeding was not a "fair and impartial trial before a fair and impartial tribunal" (p. 4) and asked that the case be remanded to the courts below for a hearing on Mr. Washington's alleged disqualification.

On May 14, 1969, the Company filed an opposition to the motion to remand which was supported by affidavits of Mr. Washington, Mrs. Grace C. Alexander (Mr. Washington's daughter), and J. Hillman Zahn and John P. Barnes of the Company (A. 2-13). The affidavits contained a full statement of the facts, more fully described below (pp. 6-9, *infra*), relating to Mr. Washington's referral of persons to the Company for employment and with respect to the employment of his children. They showed that Mr. Curtis had been aware for several years of facts that would have enabled him to raise the issue of disqualification but had not raised that issue before the Commission or either court below. On the basis of these facts the opposition argued that there was no impropriety in any action of Mr. Washington and that the Association's claim of disqualification was not timely.

A response was submitted on behalf of the Association together with an affidavit of Mr. Curtis (A. 14). In his affidavit, Mr. Curtis essentially conceded that he had been informed, allegedly by an anonymous source, that Mr. Washington's daughter was employed by the Company and that he had received this information prior to the District Court decision in 1967 (*id.*). The Supreme Court, on May 19, 1969, denied the petition for certiorari and the motion to remand

and on June 23, 1969, denied a further motion for rehearing by the Association.[6]

On September 5, 1969, the Association commenced a new proceeding before the Commission, by filing a "Motion to Rescind Orders of the Commission Nos. 4887 (Dec. 22, 1964) and 4899 (Feb. 18, 1965) and For Other Relief," and this proceeding resulted in the Commission orders now on appeal. In its motion the Association asked, *inter alia*, that the Commission rescind the two rate orders specified and require the Company to refund the rate increase which it has collected in accordance with those orders. The Association's motion set forth in an accompanying memorandum the text of the affidavit of Mr. Zahn (A. 8) and excerpts from the affidavit of Mr. Washington (A. 2) which have been referred to above.

The Company filed an opposition to the motion and attached thereto complete copies of all of the affidavits that had previously been filed in the Supreme Court, including the affidavit of Mr. Curtis (A. 14). The Association thereafter filed a response to the Company's opposition accompanied by a new affidavit of Mr. Curtis (A. 16) and by certain additional affidavits.[7]

On November 26, 1969, the Commission by Order 5408 denied the Association's motion (A. 17). In its decision, the Commission first noted that the two rate proceeding orders sought to be attacked by the Association had already been subjected to "a searching judicial review" both by the District Court for the District of Columbia and by this

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[6]395 U.S. 910 (1969) (denial of petition and motion), 395 U.S. 987 (1969) (denial of rehearing).

[7]These included affidavits from one member of the Commission and from three other persons who had participated in the rate proceeding, each stating that at the time of that proceeding he was not aware that any member of Mr. Washington's family had been employed by the Company.

Court (A. 17). It then declared that the Association's claim must be rejected as dilatory even on Mr. Curtis' own version of the facts (*id.*).

The Commission also noted that it found no basis for setting aside the rate orders and refunding the increase under the circumstances presented (A. 18). It added that the Commission had itself reviewed the orders and found that they were "a well-grounded and cogent disposition" of the issues in the rate proceeding; in fact, as the decision further noted, many of the issues were resolved adversely to the Company which received only "a fraction" of the increase it had requested (*id.*).[8]

On February 20, 1970, the Association appealed the Commission's decision to the District Court. The Commission responded by filing a motion to dismiss and the Company, having been allowed to intervene, similarly filed a motion to dismiss the appeal and to affirm the orders of the Commission. On June 16, 1970, the District Court, having received memoranda from the parties and heard oral argument, granted the motions to dismiss (A. 21-22) and filed a statement of the reasons for its decision (A. 22-24), in conformity with D.C. Code Sec. 43-705 (1967). The Association's present appeal to this Court followed.

The facts relating to the alleged disqualification of Mr. Washington are set forth in affidavits, referred to above, which were included in the record before the Commission. These affidavits disclose the following:

James A. Washington, Jr., was Chairman of the Public Service Commission of the District of Columbia from October 1959 to October 1966. Between September 1963 and August 1965, Mr. Washington presided over the rate proceeding in question (A. 2).

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[8]On December 24, 1969, the Commission denied the Association's request for rehearing by Order 5414 (A. 19).

Mrs. Grace C. Alexander, the daughter of Mr. Washington, was employed by the Company from December 1962 through November 1965 (A. 6). The maximum salary she received during this period was $115 per week (A. 9). Mr. Washington did not request, suggest or intimate that the Company should employ his daughter (A. 3, see A. 9). Mrs. Alexander applied for employment on her own initiative as a result of having read a Company advertisement in the local papers inviting applications (A. 6, see A. 9). She applied for the job under her married name and at that time to the best of her knowledge no employee of the Company was aware of her relationship to Mr. Washington (A. 6-7). Mrs. Alexander was a married woman who lived apart from her father throughout the period of her employment by the Company and Mr. Washington did not know she was employed by the Company for some time following her hiring by the Company (A. 3, 7).

During the summer of 1963, two of Mr. Washington's young sons were employed on a temporary basis by the Company, one for a period of approximately two weeks and the other for a period of approximately seven weeks (A. 9). During the summer of 1964 one of the sons was so employed on his own initiative for a period of about twelve weeks (*id.*). When that son applied again in 1965, he was not re-employed because the summer employment program had been discontinued (A. 4).

The maximum salary earned by either at any time during this summer employment was $72 per week (A. 9). These two sons were among several hundred persons who were given temporary summer employment by the Company in 1963 and 1964 (A. 9-10). The two sons were employed after taking and passing the usual Company examinations and were paid at the same wage rates generally applicable to such employment (A. 10). Mr. Washington's only connection with his sons' employment was an inquiry of the Company in July 1963 whether summer jobs were still available (A. 3-4, 10).

Beginning in 1962 the Commission held a series of meetings with representatives of the Company and other public utilities in the District of Columbia for the purpose of enhancing equal employment opportunities in such utilities (A. 4). At these meetings there were discussed various means of encouraging recruiting within the Negro community by advertising, by references from the Commission to the utilities of persons seeking employment, and by other means (*id.*). As a result of these discussions Mr. Washington and other representatives of the Commission referred persons to the Company and to other utilities in the District of Columbia for employment, but it was understood that reference did not mean employment and that any person referred would be required to qualify by taking the usual examinations and by meeting other qualifying criteria (A. 4-5).[9]

In order to broaden employment opportunities and to fulfill the continuing need for new employees Mr. Zahn, in his capacity of vice president of the Company, beginning in 1962 communicated with a number of community leaders including Mr. Washington to request them to encourage applications for employment with the Company or to supply it with names of possible employees (A. 9).[10] Some of these persons including Mr. Washington responded to this

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[9]The Commission's efforts, its meetings with the utilities, and the steps taken to encourage recruiting within the Negro community were reported in the public press in the District of Columbia. See Evening Star, Oct. 2, 1963, p. D-1; id., Oct. 3, 1963, p. A-7; The Washington Post, Oct. 3, 1963, p. B-1 (which are reprinted in this brief, pp. 27-30, infra).

[10]Among the other persons with whom Mr. Zahn communicated were Mr. Sterling Tucker of the Urban League, Mr. George E. C. Hayes, then a trustee of Howard University, Mr. John B. Duncan, then a member of the Board of Commissioners of the District of Columbia, Belford Lawson, Esq., a District of Columbia attorney, Mr. Hobart Taylor, then a member of the White House staff, and Mr. William Press of the Metropolitan Washington Board of Trade (A. 10-11).

request by referring persons to the Company as candidates for employment; persons referred were given the usual tests by the Company and, if found to be qualified, were usually offered employment (A. 11).

During the course of the hearings in the rate proceeding and before the Commission had issued its first order therein in December 1964, Mr. Curtis raised with Mr. Washington the question of the Company's employment of Mr. Washington's daughter (A. 3). On that occasion Mr. Washington confirmed that his daughter was so employed and invited Mr. Curtis to raise any question of disqualification by a motion directed to the Commission (*id.*). Mr. Washington reported on his conversation with Mr. Curtis to Commissioner Edgar H. Bernstein and Executive Secretary Joseph S. Greco (*id.*). During the subsequent appeal in the District Court, Mr. Curtis told John P. Barnes, Esq., counsel for the Company in the rate proceeding before the Commission, that he (Curtis) knew Mr. Washington's daughter was employed by the Company and that he had previously spoken to Mr. Washington about the matter (A. 12-13, see A. 14).

Mr. Curtis did not make any objection to the Commission during the rate proceeding in 1963-1965 seeking to disqualify Mr. Washington on any grounds. Mr. Curtis did not raise his objection when the Association's appeal was before the District Court between 1965 and 1967. No mention of the objection was made by Mr. Curtis during the appeal of the District Court decision to the Court of Appeals in 1968 nor was any mention made in the petition for certiorari filed in March 1969 to review the Court of Appeals decision. The objection was first made in the motion to remand filed in the Supreme Court in May 1969.

Finally, it is pertinent to note that in 1966 Mr. Washington ceased to be Chairman of the Commission and became Langston Professor of Law at Howard University Law School. In 1969 Mr. Washington was nominated to be General Counsel of the Department of Transportation. Mr.

Curtis raised the disqualification charges before the Committee on Commerce of the United States Senate, which considered the nomination, and he discussed those charges in detail.[11] Mr. Washington responded to those charges, reiterating that during the rate proceeding he had specifically invited Mr. Curtis to make a disqualification motion. Hearings, *supra*, pp. 44-45. The Committee recommended approval of the nomination and it was thereafter confirmed by the Senate. On September 22, 1970, Mr. Washington was nominated by the President to be a judge of the Court of General Sessions of the District of Columbia. His appointment was confirmed by the Senate on October 12, 1970.

ARGUMENT

The Commission gave due consideration to the Association's motion to rescind and provided a reasoned explanation for its denial of the motion. Under D.C. Code Sec. 43-705 (1967), judicial review of the Commission's orders is limited to questions of law and its findings of fact are conclusive unless unreasonable, arbitrary or capricious. Examination will show that the Commission's determination here is fully supported by applicable precedents and the actual facts.

I. THE DISQUALIFICATION OBJECTION IS UNTIMELY

It is a well-settled rule that a motion to disqualify a judge or other adjudication officer must be made in a timely fashion. A litigant is not entitled "to wait and see how the judge decides" and only then assert an infirmity which, if meritorious, could have been cured at an earlier stage.[12]

[11] See Hearings before the Committee on Commerce, United States Senate, 91st Cong., 1st Sess., pp. 24-40, 45-49 (June 11, 1969).

[12] Pacheco v. People of Puerto Rico, 300 F.2d 759, 760 (1st Cir. 1962); see Safeway Stores, Inc. v. FTC, 366 F.2d 795 (9th Cir. 1966), cert. denied, 386 U.S. 932 (1967); In re United Shoe Machinery Corp., 276 F.2d 77 (1st Cir. 1960).

Where provisions relating to disqualification of judges and administrators have been codified into federal law, the same prerequisite that the disqualification objection be timely has been included. See 28 U.S.C. Sec. 144 (1964) (Judicial Code); 5 U.S.C. Sec. 556 (Supp. V, 1970) (APA). The authorities are clear that failure to make a timely objection is a bar to its later assertion.[13]

In this instance, the facts demonstrate that the Association's objection is untimely in the extreme and the Commission was fully justified in rejecting the motion to rescind on this ground among others. Mr. Washington's affidavit shows that Mr. Curtis, who has represented the Association at all pertinent times, learned during the rate proceeding prior to December 1964 that Mr. Washington's daughter was employed by the Company and raised the matter with Mr. Washington at that time (A. 3). Mr. Washington confirmed that his daughter was so employed, and he invited Mr. Curtis to raise any objection he might have by motion to the Commission (*id.*).[14] Accordingly, during the Com-

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[13]North American Airlines v. CAB, 100 U.S. App. D.C. 5, 12, 240 F.2d 867, 874 (1956), cert. denied, 353 U.S. 941 (1957); Lucas v. United States, 325 F.2d 867 (9th Cir. 1963); Bower v. Eastern Airlines, 214 F.2d 623, 627 (3d Cir. 1954); Kramer v. United States, 166 F.2d 515 (9th Cir. 1948).

[14]Mr. Curtis has denied this conversation, asserting that he raised with Mr. Washington the issue of his daughter's employment in a telephone conversation after the rate proceeding but was unable to obtain any direct response (A. 14-15). This explanation, which assumes that Mr. Curtis was even temporarily satisfied or stilled by the alleged evasion of his question, is scarcely consistent with his own record of zeal in pursuing this litigation. In all events, his explanation is flatly inconsistent not only with Mr. Washington's affidavit, but with the affidavit of Mr. Barnes. That affidavit shows that during the District Court review in 1967, Mr. Curtis asserted to Mr. Barnes "that he knew that in fact Mr. Washington's daughter was employed by the Company because he had previously spoken about this matter to Chairman Washington and the Chairman had stated that his daughter was so employed by the Company" (A. 12-13).

mission proceeding itself, Mr. Curtis had available facts which would have allowed him to raise the substance of the disqualification objection now advanced.[15]

Mr. Curtis' own affidavit filed in the Supreme Court concedes that at some unspecified time prior to the District Court's decision in 1967 Mr. Curtis was informed, allegedly by an anonymous telephone call, that Mr. Washington's daughter had been employed by the Company, and Mr. Curtis' affidavit reveals that he thereupon raised the matter with the Commission's Executive Secretary Joseph Greco and with Mr. Washington himself (A. 14).[16] Mr. Curtis' knowledge of this employment before the District Court passed upon the rate orders is confirmed by the affidavit of Mr. Barnes which shows that Mr. Curtis told Mr. Barnes during the District Court proceeding that he (Curtis) knew the Company had employed Mr. Washington's daughter (A. 12-13).

Although the information described above gave him full opportunity to do so, Mr. Curtis did not make his disqualification objection to the Commission during the rate proceeding in 1964-1965 or before the District Court during

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[15]The efforts of the Commission to increase the employment of Negroes by the District of Columbia utilities—specifically including the referral of applicants by Mr. Washington among others—had been fully reported in the press, at least since 1963. See pp. 27-30, infra.

[16]In his motion to remand filed in the Supreme Court (p. 3), Mr. Curtis stated that he had "earlier" heard rumors that the Company had given "employment not only to the daughter but also to the son of the Chairman of the Public Service Commission . . . ." In a different affidavit submitted to the Commission in connection with the motion to rescind, Mr. Curtis said nothing about the anonymous telephone call, the conversation with Mr. Washington, or the "rumors," but he asserted he was unaware during the Commission rate proceeding that Mr. Washington had "three children" employed by the Company and that only in the Supreme Court proceeding did he learn that "at least one was a minor child" residing in Mr. Washington's household (A. 16).

its review of the rate orders between 1965 and 1967. Nor did he raise that objection in the Court of Appeals during its review during 1967-1968, or in his petition for certiorari submitted in March 1969. Not until May 1969—over *four years* after his confrontation with Mr. Washington (A. 3)—did Mr. Curtis first raise the objection in his Supreme Court motion and, indeed, four more months elapsed before the Association filed its motion to rescind with the Commission in September 1969. Any number of authorities make it plain that delays far more brief preclude disqualification objections.[17]

The Association has sought to excuse its delay in raising the disqualification objection on the ground that Mr. Curtis' previous knowledge of employment by the Company of Mr. Washington's children was based on "rumor, and then only as to the daughter . . ." (Ass'n Br. 27). However, even limiting discussion to Mr. Curtis' own statements, he has conceded that he was specifically told prior to the District Court's affirmance of the rate orders that a child of Mr. Washington was employed by the Company. His own admitted actions show he thought the information reliable enough to raise the issue with Mr. Washington himself and to pursue thereafter with Messrs. Barnes and Zahn (A. 12, 14).[18]

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[17]E.g., R. A. Holman & Co. v. SEC, 366 F.2d 446 (2d Cir. 1966), cert. denied, 389 U.S. 991 (1967) (objection made after eighteen months of hearings); Converse v. Udall, 262 F. Supp. 583 (D. Ore. 1966), aff'd, 399 F.2d 616 (9th Cir. 1968), cert denied, 393 U.S. 1025 (1969) (objection made before hearings but after five months of notice); Bethlehem Steel Co. v. NLRB, 74 U.S. App. D.C. 52, 120 F.2d 641 (1941) (objection not made until judicial review).

[18]It also appears that Mr. Curtis learned well before he made his objection that a son of Mr. Washington was also employed (see p. 12, n. 16, supra). However, the decisive point is that Mr. Curtis knew that a child or children of Mr. Washington were employed by the Company. That employment is the gravamen of the disqualification argument and the number of children involved can hardly be decisive.

Discussing the requirement that a disqualification objection be made in a timely manner, one court recently stated, "'Timely' means at the first reasonable opportunity after discovery of the facts tending to show disqualification . . . ."[19] After the anonymous telephone call to Mr. Curtis and his conversation with Mr. Washington, the Association could readily have pursued the disqualification issue formally before either the Commission or the District Court and obtained the same prompt, detailed disclosure by the Company and Mr. Washington that resulted when the Association eventually chose to raise the matter in the Supreme Court. The failure to raise the objection and obtain this disclosure until the final stage of review indicates not merely a lack of diligence but a deliberate tactic to preserve the objection as a last resort.[20]

The Association's belated attack not only violates the letter of the rule requiring that disqualification be urged at

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[19]Long Beach Federal Savings & Loan Ass'n v. Federal Home Loan Bank Board, 189 F. Supp. 589, 611 (S.D. Cal. 1960), rev'd on other grounds, 295 F.2d 403 (9th Cir. 1961). Mr. Curtis now cites In re Fox West Coast Theatres, 88 F.2d 212, 226 (9th Cir.), cert. denied, 301 U.S. 710 (1937), for the proposition that he could not proceed on "rumors" (Ass'n Br. 23). That case simply indicates that allegations unsupported by information justifying them do not prevail over sworn denials. Nothing in the decision suggests that a litigant who has information that disqualification may exist is excused from raising his objection at the earliest opportunity so that the facts may be disclosed and the issue disposed of at an early stage of the litigation. In the instant case on Mr. Curtis' own admission he had sufficient information to cause him to raise the issue of disqualification informally. If he had acted upon Mr. Washington's suggestion that he file a motion with the Commission all of the facts would have been disclosed and the matter disposed of at that time.

[20]Rejecting as untimely a disqualification objection, one court recently stated: "The same diligence which produced the affidavit within a few days after affirmance of the defendants' convictions upon appeal could doubtless have produced it at any prior time." United States v. Hoffa, 245 F. Supp. 772, 776 (E.D. Tenn.), aff'd, 349 F.2d 20 (6th Cir. 1965), aff'd, 385 U.S. 293 (1966).

the earliest possible stage, but also the policies underlying that rule. The rule is based in part upon the wastefulness of allowing administrative and judicial proceedings to be undone by defects that might readily have been cured at an earlier stage, see *Bishop* v. *United States*, 16 F.2d 410 (8th Cir. 1926), and here the Commission proceeding was completed and full review had in two courts before the Association unveiled its previously known objection. A further reason for the rule, equally applicable here, is the manifest unfairness of allowing the Association to gamble upon winning before the Commission or the courts while reserving the disqualification objection if it loses initially so it may secure a second chance to win its case. See *Peckham* v. *Ronrico Corp.*, 288 F.2d 841 (1st Cir. 1961).[21]

II. THE DISQUALIFICATION OBJECTION IS WITHOUT MERIT

The grounds advanced by the Association for its assertion that Mr. Washington was disqualified from passing upon the Company's rate increase application in the 1963-1965 proceeding are not stated with precision. However, its argument appears to reduce itself to two principal points: First, Mr. Washington is disqualified because children of Mr. Washington were employed by the Company during the rate

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[21] The injustice of allowing the Association to reserve its disqualification argument for several years is emphasized in this case by its request for an immediate refund by the Company of the increase collected in the past five years pursuant to the rate orders. If the disqualification objection had been made and resolved in 1964, then even a decision that Mr. Washington should not participate would still have allowed the Company to justify the increase before a differently constituted Commission. There is every reason to believe this would have occurred since the critical votes taken in the rate proceeding were unanimous, two reviewing courts found no error, and the presently constituted Commission with three entirely new members has reaffirmed the correctness of the original rate orders.

proceeding (Ass'n Br. 15, 28-29); and second, he is disqualified because the Company allegedly did favors for Mr. Washington by hiring persons he referred to it (*id.* 15, 20-21). While the points have been embellished they are essentially the same ones made to the Supreme Court in the Association's unsuccessful motion to remand, and examination readily shows them to be without merit.

Considering first the employment of Mr. Washington's children, the pertinent facts are wholly undisputed. Mr . Washington's daughter was employed by the Company from 1962 through 1965 (A. 9). Two of Mr. Washington's sons were employed on a temporary basis during the summer of 1963 and one was similarly employed during the summer of 1964 (*id.*). On no occasion did Mr. Washington request the Company to hire any of his children.[22]

In the case of each of the children, the job was a relatively low-paid position and the child was paid at the same wage rates as other employees holding comparable posts. Neither the level of their compensation or any other incidents of their employment were or could have been affected by the outcome of the rate proceeding. There is therefore no basis for the assertion that the children, or Mr. Washington by reason of their employment, had any financial interest in the rate proceeding that could give rise to disqualification.

The claim that Mr. Washington was disqualified because of this employment of his children amounts to an assertion that a judge or adjudication officer cannot sit in a proceeding where members of his family or close relatives are employed in subordinate capacities by a company involved

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[22]Mr. Washington's daughter obtained her job through her own efforts and under her married name. Mr. Washington was not even aware at the time that she had obtained this employment, and the Company did not know of her relationship to Mr. Washington when she was hired (A. 2, 6-7, 9). In the case of Mr. Washington's two sons, Mr. Washington did no more than inquire in July 1963 whether summer jobs -which were then provided for hundreds of boys--were still available (A. 3, 10).

in the proceeding. Every discovered judicial authority holds that such a relationship is not a basis for requiring disqualification. *In re Fox West Coast Theatres*, 88 F.2d 212 (9th Cir.), *cert. denied*, 301 U.S. 710 (1937); *Moody* v. *City of University Park*, 278 S.W.2d 912 (Tex. Civ. App. 1955) (writ of error refused by Texas Supreme Court); *Van Itallie* v. *Borough of Franklin Lakes*, 28 N.J. 258, 146 A.2d 111 (1958); see *County Court* v. *City of Grafton*, 77 W.Va. 84, 86 S.E. 924 (1915).

In *In re Fox West Coast Theatres*, the district judge's son-in-law was alleged to be a director and secretary of a corporate party in the case. On appeal, the Court of Appeals for the Ninth Circuit explicitly stated that such a relationship would not disqualify the judge. 88 F.2d at 226. In the *Moody* case, the wife of one member of a zoning board was employed as a saleslady by a department store which was seeking a contested development permit from the board; the wife's salary was regularly deposited in the family's joint bank account. 278 S.W.2d at 918. On review, the court explicitly rejected a claim that such a relationship disqualified the board member, stating it was "in no sense tantamount to a disqualification."[23] These decisions confirm that the employment of children of Mr. Washington, in low-ranking positions among thousands of other Company employees, is no basis whatever for disqualifying him from a rate proceeding in which neither he nor they had an individual interest.

The Association adduces no contrary decisions but sets forth several statutes and orders which prove to have no application to the present case. The Association's brief (14, 21) relies directly on 18 U.S.C. Sec. 208 (reprinted in this brief, p. 31, *infra*). That statute forbids any Government

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[23]278 S.W.2d at 919. It is also pertinent that the court rejected a related claim that the member whose wife was employed as a saleslady should have announced that fact in the hearing. The court reasonably termed this nondisclosure "of no consequence," since the relationship was not disqualifying. Id.

official from participating in a "proceeding" in which any "minor child" of his has "a financial interest." Since it is obvious from the established facts that Mr. Washington's children had no "financial interest" in the rate proceeding, the statute gives the Association no support.[24] On the contrary it is significant that the statute does not make employment of children itself a disqualification, since it comprehensively specifies the relationships which are disqualifying.

The Association's brief (14-15, 20) also refers to Sections 201(a), 401(a)(1), and 403(a) of Executive Order 11222, 30 Fed. Reg. 6469 (reprinted in this brief, pp. 32-33, *infra*). Section 201(a) prohibits a Government employee from soliciting or accepting any gift, favor or comparable thing of monetary value from a corporation regulated by his agency. Sections 401(a)(1) and 403(a) require *inter alia* certain Presidential appointees to file with the Civil Service Commission a list of all corporations whether or not regulated in which the appointee, his "minor child," or "other member of his immediate household" have "any continuing financial interests . . . as a result of any current or prior employment . . . ." None of these provisions purports to disqualify adjudicatory officers; disqualification is comprehensively treated in a detailed statute—18 U.S.C. Sec. 208 (1964)—which has already been shown to be inapplicable on the present facts. See pp. 17-18, *supra*.

Moreover, there was no violation of the cited provisions of the executive order. As the facts recited above show, nothing done by the Company in connection with employment of Mr. Washington's children has been shown to constitute a favor or other forbidden transaction within the meaning of Section 201(a) of that order. As to sections

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[24]The statute provides that the Government official may not himself be an officer, director, or employee of a company which is party to the proceeding. No such restriction is imposed when a child or other relative is employed by the company; "minor children" do cause disqualification only when they have a "financial interest" in the proceeding.

401(a)(1) and 403(a), there was no occasion for Mr. Washington to report the Company's employment of his children to the Civil Service Commission since he had no minor children or members of his immediate household employed by the Company either at the time the executive order became effective in May 1965 (30 Fed. Reg. 6469) or thereafter.[25]

The other principal ground advanced for disqualifying Mr. Washington is that the Company extended to him "the privilege to refer persons for employment" by the Company (Ass'n Br. 21). The facts, sworn to by Mr. Washington and Mr. Zahn and nowhere controverted by the Association, squarely refute the charge that any power of "patronage" (Ass'n Br. 20) was conferred on Mr. Washington. These referrals did not represent any peculiar relationship between the Company and Mr. Washington but were part of a publicized program of the Commission to broaden equal employment opportunities in all public utilities in the District of Columbia (A. 4-5, see pp. 27-30, *infra*). Referrals were made not only by Mr. Washington but by many others (A. 10-11).

Persons referred by Mr. Washington were hired only if they qualified under usual Company standards and they were neither favored nor treated differently than applicants responding to advertisements placed by the Company in the newspapers (A. 5, 11). Mr. Washington, who did not even know many of the persons he referred to the Company (A. 5), was specifically requested along with other persons to

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[25]Neither of his two minor sons were employed after the summer of 1964 and Mr. Washington's daughter was a married woman living outside his household during the entire period of her employment (A. 7, 9). Moreover, the "continuing financial interests" provision does not appear to embrace mere employment of children, absent some form of profit sharing or accrued interest, for it specifies as examples "a pension or retirement plan" and "shared income." Employment is specifically covered by a different subsection (Sec. 401(a)(1)(A)) that concerns only that of the Presidential employee and not family members (see Sec. 401(a)(1)(B)).

make such references because of his wide acquaintanceship in the Negro community (A. 10).[26] There is thus no justification for suggesting that Mr. Washington's referral of applicants in any way constituted a personal favor by the Company to Mr. Washington or provided him with any personal benefit which could obligate him to the Company.[27]

III. THERE IS NO JUSTIFICATION FOR THE ASSOCIATION'S DEMAND THAT THE RATE ORDERS BE RESCINDED AND REFUNDS ORDERED

Since the Association's assertion that Mr. Washington was disqualified from participating in the Commission's proceeding is both untimely and without merit, it provides no basis for the Association's contention that the rate orders "should be rescinded as void" and the Company required to refund the amount of the rate increase collected pursuant to those orders (Ass'n Br. 41). That relief would retroactively invalidate rate orders that became effective more than five years ago and that have been upheld on their merits in proceedings for judicial review that ended in May 1969 when

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[26]The Association asks rhetorically in its brief why Mr. Washington was requested to refer persons when "better equipped" agencies—such as Howard University—were available to do so (Ass'n Br. 21). In point of fact the record shows that persons associated with both the Urban League and Howard University were among those also asked to refer applicants (A. 10-11).

[27]The references by the Association (Ass'n Br. 13-14, 20) to the federal bribery statute—18 U.S.C. Sec. 201 (1964)—do not deserve any consideration. There is not a shred of evidence that the Company or Mr. Washington took any step whatever with the corrupt intent required by the bribery statute. The Association also cites a variety of judicial canons (Ass'n Br. 18-19) without ever seeking in most instances to relate them to this case. The canon most nearly in point —ABA Judicial Canon No. 13 (quoted Ass'n Br. 19)—is essentially adverse to the Association's position since it states that a judge shall not act where a near relative is a "party" in the controversy; nothing in it suggests a judge is disqualified where such relatives are among thousands of low ranking, wage employees of a party and themselves have no stake in the outcome.

the Supreme Court denied the Association's petition for certiorari and its motion to remand. Such relief would not be justified even if the basic infirmities in the Association's position were disregarded.

Even if the disqualification objection were both timely and meritorious, the relief to which the Association might be entitled at most would not exceed a reexamination of the rate orders without the participation of the member of the Commission alleged to have been disqualified. In the instant case the Association has had this relief. The Commission reexamined the original rate orders and affirmed them on their merits, holding that they were "a well grounded and cogent disposition of the issues presented in the proceedings leading up to them" (A. 18).

The Association asserts that this determination "has no legal meaning" because "[t]his Commission is a new Commission and not one of its members sat on the old case or heard one word of the testimony" (Ass'n Br. 41). But the fact that the members of the Commission had not heard the oral testimony in the original proceeding did not disqualify them from reviewing the record and determining that it justified the findings and conclusions embodied in the rate orders. The record before the Commission contained all of the evidence and arguments that the Association had seen fit to present to the Commission as bearing upon the issues in the rate proceeding. The Association makes no showing that a review of those issues required, or would be affected by, an appraisal of the demeanor of witnesses or any similar factor that would involve the hearing of oral testimony.[28]

[28] A review of the briefs filed in this Court in the proceeding for judicial review of the rate orders (Telephone Users Ass'n v. Public Serv. Comm'n, Nos. 21,318-19, Oct. 21, 1968) discloses that the Association's attack on the merits of the Commission's orders did not rest on any ground that depended upon, or even incidentally involved, the demeanor of witnesses or any other matter that could not reasonably be determined by an appraisal of the written record and without hearing oral testimony.

The Association also asserts that the Commission could not properly reexamine and affirm the rate orders because it has "no authority to set rates for the past, but could only set rates as to the future" (Ass'n Br. 34). On this basis the Association not only attacks the validity of the Commission's action, but also argues that the claim of disqualification if accepted precludes any remand for corrective action by the Commission and requires this Court to order the Company to refund the amount of the rate increase it has collected pursuant to the Commission's orders.

The premise of the argument does not support its conclusions. The fact that an agency has no general authority in the first instance to prescribe the rates for the past does not mean that when its order prescribing rates for the future has been set aside on judicial review, the agency may not correct defects in its order and give the correction retroactive effect. This is established by the decision in *United States* v. *Morgan*, 307 U.S. 183 (1939).

In that case a rate order had been held invalid on the ground that the Secretary of Agriculture had not held a fair hearing because he had engaged in *ex parte* conferences with members of his prosecuting staff and had not given the opposing parties a reasonable opportunity to answer the staff's contentions. *Morgan* v. *United States*, 304 U.S. 1, 22 (1938). The disposition of a substantial sum of money, which had been impounded, depended upon a valid exercise of the Secretary's rate-making powers. The Supreme Court held that its decision invalidating the rate order did not mean that this money should forthwith be refunded but that the Secretary retained the power to make a valid rate order which would be effective as of the date of his original action. 307 U.S. 183.[29] Thereafter the Secretary of

[29]The Supreme Court pointed out that the Secretary "was free to make an order fixing rates for the future, and for that purpose or any other within the purview of the Act he is now free to determine a reasonable rate for the period antedating any order he may now

Agriculture held a proper hearing and issued a new order which established the same level of rates that had been fixed by the order held to be invalid and the disposition of the fund was governed by that order. *United States* v. *Morgan*, 313 U.S. 409 (1941). The same principle was applied in *Atlantic Coast Line R.R.* v. *State of Florida*, 295 U.S. 301 (1935).

Williams v. *Washington Metropolitan Area Transit Commission*, 134 U.S. App. D.C. 342, 415 F.2d 922 (1968), *cert. denied*, 393 U.S. 1081 (1969), is not contrary to the cases cited above and the Association's reliance upon that decision is misplaced. In *Williams* this Court had previously set aside a rate order and remanded the case to give the agency an opportunity to correct its error. The Court held that the new order entered by the agency on remand was also defective and, the Commission having failed to conduct the inquiries and make the findings directed by the Court, that there should not be a second remand to the Commission but that the money collected under the rate order should be refunded.

In refusing to order a second remand, the Court pointed out that remand was inappropriate both because of changed circumstances, *i.e.*, the issuance of supervening rate orders, and because of the substantive grounds of its decision, *i.e.*, "that at no time in this proceeding has the Commission made the investigations and the resolutions essential to a legitimate exercise of its authority to prescribe just and reasonable fares." 134 U.S. App. D.C. at 358-59, 415 F.2d

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make." 307 U.S. at 192. This statement applies to the Commission in the present case. It was free to make an order determining lawful rates for the future and in fact its order reaffirming the original rate orders had that effect. In *Morgan* the Supreme Court also pointed out that the Secretary, in addition to his authority to prescribe rates for the future, was given general investigatory authority by Sec. 309 (c) of the Packers and Stockyards Act, 1921 (now 7 U.S.C. Sec. 210(c) (1964)) which empowered him to inquire into the past. 307 U.S. at 192 n. 3. Here the Commission has comparable investigatory authority under D.C. Code Sec. 43-408 (1967).

at 938-39. These circumstances do not exist in the present case. Here the rates fixed in the Commission's 1963-1965 proceeding remained in effect and had not been superseded by intervening changes when the Commission reconfirmed them, and, indeed, those rates continue in effect at the present time. Similarly, the alleged disqualification of Mr. Washington, which is fully capable of correction by a proceeding wherein no disqualified commissioner participated, is quite unlike the fundamental substantive infirmities found in *Williams* which the Commission failed to correct even after having been directed to do so by an order of this Court.

The opinion in *Williams* recognized the vitality of the rule applied in *Morgan*. 134 U.S. App. D.C. at 358 n. 82, 361-62 n. 96, 415 F.2d at 938 n. 82, 941-42 n. 96. The opinion also recognized that "even where agency action must be set aside as invalid, but the agency is still legally free to pursue a valid course of action, a reviewing court will ordinarily remand to enable the agency to enter a new order after remedying the defects that vitiated the original action." 134 U.S. App. D.C. at 359-60, 415 F.2d at 939-40 (footnote omitted). Here the Commission was "still legally free to pursue a valid course of action" because under *United States* v. *Morgan*, *supra*, it had a "continuing power . . . to deal with the subject matter of the proceeding." 134 U.S. App. D.C. at 360, 415 F.2d at 940. It follows that the Commission did not exceed its authority when it reexamined and reaffirmed its rate orders, so that the Association has already been afforded the full measure of relief which might be appropriate where a timely and meritorious disqualification objection was accepted by a court on direct review of a rate order.

CONCLUSION

For the reasons stated the decision of the District Court should be affirmed.

Respectfully submitted,

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December 9, 1970

THE EVENING STAR, Wed., Oct. 2, 1963, Page D-1

SEEK TO END IMBALANCE

Utilities Confer With P.U.C. on Negro Hiring

By DAN GOTTLIEB
Star Staff Writer

The District Public Utilities Commission has been meeting informally with the city's three major utility companies to discuss means of increasing the number of Negroes they employ, The Star has learned.

The companies—Chesapeake and Potomac Telephone, Washington Gas Light and Potomac Electric Power — all have announced policies of hiring solely on the basis of merit, without regard to race. The P.U.C. takes the position, however, that because of past discriminatory practices, Negroes do not seek jobs with the utility companies to the extent that they might.

The meetings have been directed toward discussing how more qualified Negroes can be encouraged to apply to the companies and developing a "conscious program to clear up the imbalance in employment in the utility field," according to Chairman James A. Washington, Jr.

Although the P.U.C. has no direct authority over the hiring practices of the companies, it invited representatives of the companies to participate in the discussions on a "friendly" basis, Mr. Washington explained. The first meeting was held last September, a second in March and a third was scheduled for today.

Among the steps discussed at the meetings for encouraging more Negro applicants have been: use of Negro faces in advertisements for help; recruitment at Howard University; use of the Urban League's referral services, and encouraging students in public schools to complete high school so they will be qualified for jobs, and use of the consulting services and literature of the Commissioners' Council on Human Relations.

Asked for their reaction to the P. U. C. meetings, representatives of all three utilities said they regarded them as a means of exchanging information. All said that they are not doing anything now, however, that they were not doing before the meetings began.

Mr. Washington said the meetings have resulted in a "more conscious effort" to encourage Negro applicants, especially among the personnel dealing directly with hiring and recruiting. In return, the P. U. C. has learned of difficulties the utilities have in obtaining qualified Negroes for

(continued on next page)

certain jobs and in integrating previously all-white departments.

Figures on the number of Negroes employed have been submitted to the P. U. C., but Mr. Washington declined to reveal them because they were given on a "confidential" basis. The P. U. C. does not have any specific number goal in mind, the chairman said. "We're interested in correcting the past imbalance." The meetings will be kept up as long as the companies feel the need for guidance, he said.

Mr. Washington, himself a Negro said that he has on occasion referred Negroes who were looking for jobs to the utilities. Asked whether he thought this might be pressuring the utilities to accept those he referred, he replied: "Absolutely not!" When a utility executive called to apologize for turning down someone he had sent over, "I told him that the mere fact I sent someone down did not mean anything. I made it clear that I don't want them to lower their standards."

The P. U. C. is interested not only in total numbers but in more Negroes moving up into the "middle-management" ranks of the companies, Vice Chairman Edgar H. Bernstein said.

An outside party to the discussions, Sterling Tucker, executive director of the Urban League, said that the P. U. C.'s efforts have been useful. The league has had "considerably closer and more productive" contact with the companies since last September when the first discussion took place. Other factors, such as CORE's threatened picketing and sit-ins at downtown offices of the gas and electric companies, also have played a part in spurring the increased contact, he said.

From other sources than the P. U. C. The Star has obtained the following data on Negroes in the utilities:

Washington Gas Light, as of February 28, 1963, had 637 Negroes in a total work force of 2,487, according to information given the United States Civil Rights Commission.

Chesapeake and Potomac now has about 6,700 employes, of which about 10 per cent are Negro, according to a company spokesman.

Potomac Electric Power has about 3,600 employes, but the company's policy is to refuse to give out figures on Negro employment.

A spokesman explained that the company feels the numbers might be used by certain groups to demand that a certain number more be hired immediately. "We feel we are doing it the right way—employing whenever a qualified Negro appears," the spokesman said.

Merit hiring is not the P. U. C.'s direct responsibility chairman Washington conceded. Nevertheless, the commission might have jurisdiction over any increased costs of operation resulting from discrimination, the chairman said.

Once before in recent years the P. U. C. did concern itself with the effect of discriminatory hiring practices on rates. In a 1954 Capital Transit Company fare case (the predecessor company of D. C. Transit which is under new management and ownership), the P. U. C. said that failure to bring Negroes into its work force "resulted in increases in labor costs." It could not pin down how much extra the company paid in overtime (as a result of labor shortages) and newspaper advertisements, however. The P. U. C. implied that if the extra costs had been enough to affect fars, it would have disallowed these increased labor costs as a basis for requesting higher fares.

THE EVENING STAR A-7
Washington, D. C., Thursday, October 3, 1963

P.U.C. Chairman Notes Decrease In Racial Bias

"Satisfactory progress" is being made by the three major public utilities serving Washington in their efforts to end discrimination in hiring and promotions, the chairman of the Public Utilities Commission said today.

The chairman, James A. Washington, jr., and others from the commission have been meeting with representatives of the Chesapeake & Potomac Telephone Co., Washington Gas Light Co. and Potomac Electric Power Co. each six months since September, 1962.

Following the most recent meeting, held yesterday, Mr. Washington said that, if the progress reported by the companies continues, "it won't be too long before the imbalance is corrected."

No major problems were reported by any of the three companies, he said, although PEPCO asked for help in finding qualified Negro engineers and clerk-stenographers.

Yesterday's meeting was the third held by the P. U. C. and the companies. The first was in September of last year, and a second was held in March.

THE WASH. POST, Thu., Oct. 3, 1963, Page B-1

PUC, Utility Firms Air Job Equality

Agency Spurs Companies to Hire More Negroes

The District Public Utilities Commission met with representatives of the city's three major utility firms yesterday to discuss merit hiring.

The session was the third in a series of meetings initiated by the PUC more than a year ago to encourage the employment of more Negroes.

PUC chairman James A. Washington Jr. described the meetings as "roundtable discussions" aimed at solving problems in recruiting and employing qualified Negro workers.

All of the companies hire Negroes, he said, but the PUC has been urging a more "positive approach" specifically aimed at attracting Negro job applicants, Washington said.

The three companies are Chesapeake & Potomac Telephone, Potomac Electric Power and Washington Gas Light.

They are sending representatives to the sessions without complaint, but spokesmen for the firms say they are doing nothing now that they have not done before in providing equal employment opportunities.

Washington, however, believes the meetings have produced positive results.

He said the firms are now recruiting at Howard University and working with the Washington Urban League on job referrals.

The telephone company also is using pictures of Negroes as well as whites in its advertisements which encourages Negroes to apply for jobs, he said.

A spokesman for the telephone company said yesterday that the firm now has 816 non-whites among its 6704 employes. He said this is more than 12 per cent of the work force, compared with 9.5 per cent at the end of March.

The other two companies do not release racial statistics, but Washington Gas Light informed the U. S. Civil Rights Commission in February that 67 of its 2487 employes are Negroes.

Washington said he does not know how many of Pepco's 3600 workers are Negro, but added, "I'm certain they are going foreward."

18 U.S.C. Sec. 208 (1964)

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be fined not more than $10,000, or imprisoned not more than two years, or both.

(b) Subsection (a) hereof shall not apply (1) if the officer or employee first advises the Government official responsible for appointment to his position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee, or (2) if, by general rule or regulation published in the Federal Register, the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the integrity of Government officers' or employees' services.

EXECUTIVE ORDER NO. 11222

May 8, 1965, 30 F.R. 6469

Standards of Ethical Conduct for Government Officers and Employees

By virtue of the authority vested in one by Section 301 of Title 3 of the United States Code [section 301 of Title 3, The President], and as President of the United States, it is hereby ordered as follows:

* * * * *

Section 201. (a) Except in accordance with regulations issued pursuant to subsection (b) of this section, no employee shall solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any person, corporation, or group which–

(1) has, or is seeking to obtain, contractual or other business or financial relationships with his agency;

(2) conducts operations or activities which are regulated by his agency; or

(3) has interests which may be substantially affected by the performance or nonperformance of his official duty.

* * * * *

Section 401. (a) Not later than ninety days after the date of this order, the head of each agency, each Presidential appointee in the Executive Office of the President who is not subordinate to the head of an agency in that Office, and each full-time member of a committee, board, or commission appointed by the President, shall submit to the Chairman of the Civil Service Commission a statement containing the following:

(1) A list of the names of all corporations, companies, firms, or other business enterprises, partnership, nonprofit organizations, and educational or other institutions–

(A) with which he is connected as an employee, officer, owner, director, trustee, partner, advisor, or consultant; or

(B) in which he has any continuing financial interests, through a pension or retirement plan, shared income, or otherwise, as a result of any current or prior employment or business or professional association; or

(C) in which he has any financial interest through the ownership of stocks, bonds, or other securities.

* * * * *

Section 403. (a) The interest of a spouse, minor child, or other member of his immediate household shall be considered to be an interest of a person required to submit a statement by or pursuant to this part.

* * * * *

BRIEF FOR APPELLEE PUBLIC SERVICE COMMISSION

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 24,571

TELEPHONE USERS ASSOCIATION, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, ET AL.,

Appellee.

Appeal From The United States District Court
For The District Of Columbia

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QUESTION PRESENTED

In the opinion of appellee Public Service Commission of the District of Columbia the question presented is:

Was the court below correct in dismissing an appeal from an order of the Public Service Commission, denying a motion to rescind orders entered by the Commission in 1964 and 1965, when the court found the Commission had committed no error of law and its findings of fact were not unreasonable, arbitrary or capricious?*

*This case was before this Court as The Telephone Users Association, Inc. v. Public Service Commission, D. C., Consolidated Cases Nos. 21,318 and 21,319, and an unreported judgment of affirmance was rendered on October 21, 1968

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BRIEF FOR APPELLEE PUBLIC SERVICE COMMISSION

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Appellees.

Appeal From The United States District Court
For The District Of Columbia

COUNTERSTATEMENT OF THE CASE

Appellant's statement of the case employs an argumentative approach and includes inaccuracies with respect to matters which it brings to the attention of the court. Appellee Public Service Commission of the District of Columbia (hereinafter "PSC" or "Commission") therefore deems it necessary to make a short counterstatement of the case embodying facts reflected by the records certified to the court in conformity with statutory requirements together with the official reports of the courts which have had to deal with appellant's contentions.

On September 27, 1963, the Chesapeake and Potomac Telephone Company (the "Company") filed a rate application with the Public Service

Commission stating that since its last general rate proceeding in 1954, its rate of return had declined due to wage and operating cost increases and the cost of obtaining capital financing among other things. The Company sought approval of rate changes within the District of Columbia estimated to produce approximately $10,500,000 in additional annual revenues on its intrastate business equating to an approximate return of 8 per cent on its rate base. Beginning in December, 1963, the Commission held hearings on the rate application and the hearings encompassed over 40 days involving the testimony and cross-examination of over 20 witnesses and a hearing transcript of over 5000 pages.

Proceedings before the Commission were handled in two phases. The first phase established the amount of revenue necessary for the Company to earn a fair return on that part of its investment used to provide intrastate telephone service in the District of Columbia. Order No. 4887, as amended and modified by Order No. 4899, concluded that the fair rate of return to the Company was in the range of 6.25 per cent to 6.40 per cent and utilized the lower end of the range to determine the Company's earnings requirement, which amounted to a deficiency in earnings based upon the test year of $1,112,900 in operating income equating to $2,346,900 in gross operating revenue before taxes. Among the several intervenors before the Commission was Telephone Users Association, Inc. ("TUA") represented by Arthur S. Curtis, its president, counsel and only identified member. Appellant TUA filed appeals from Order Nos. 4887 and 4899 in the United States District Court for the District of Columbia (C.A. No. 909-65).

Meanwhile, the Company had been directed by the Commission to submit proposed rate schedules necessary to carry out the Commission's above-described orders. After further proceedings, not here questioned, the Commission issued Order No. 4976 prescribing a revised schedule of rates for telephone service within the District of Columbia, effective on August 7, 1965.

Appellant TUA also filed an appeal in the United States District Court for the District of Columbia (C.A. No. 2916-65) from the above rate order and the two actions were thereafter consolidated for hearing in the District Court. The two actions contained over 40 allegations of error and after argument lasting four days, the court issued an order on July 5, 1967, affirming the orders of the Commission and dismissing the appeals and accompanied the order with a memorandum opinion which found that the Commission did not err as a matter of law in any of the respects alleged and that the Commission's findings were not unreasonable, arbitrary or capricious (TUA, Inc. v. PSC of D.C., 271 F Supp. 393, 1967).

TUA thereafter appealed to the United States Court of Appeals for the District of Columbia Circuit. In that court TUA relied upon only six of the more than 40 allegations of error it had urged before the District Court. The case was submitted to the court on briefs by stipulation of the parties. The court, per curiam, affirmed the order of the District Court (USCA Nos. 21,318 and 21,319, D. C. Cir., October 21, 1968) in an unreported judgment.

TUA thereafter filed a petition for a writ of certiorari in the

Supreme Court of the United States. While the petition for writ of certiorari was pending, TUA, on May 9, 1969, filed a motion to remand the case on the grounds that a former member of the Commission, who had served as its Chairman at the time of the 1964 and 1965 rate proceeding, was disqualified from participating in the proceeding. The Supreme Court denied the motion to remand at the same time that it denied the petition for writ of certiorari (395 U.S. 910, 23 L. Ed. 2d 223) and a subsequent petition for rehearing was also denied (395 U.S. 987, 23 L. Ed. 2d 776, 1969).

On September 5, 1969, TUA filed with the Commission a "Motion to Rescind Orders of the Commission Nos. 4887 (December 22, 1964) and 4899 (February 18, 1965) and for other relief" based upon the same charge of disqualification it had presented to the Supreme Court. The Motion to Rescind, like the motion to remand presented to the Supreme Court, was opposed, and such opposition included affidavits* of James A. Washington, Jr. (Ap. 2-5), Mrs. Grace C. Alexander (Mr. Washington's daughter) (Ap. 6-7), Mr. J. Hillman Zahn (Ap. 8-11), John P. Barnes, Esq. (Ap. 12-13) and Mr. Arthur S. Curtis (Ap. 14-15).

On November 26, 1969, the Commission by Order No. 5408 (Ap. 17) denied TUA's Motion to Rescind and subsequently on December 24, 1969, denied an application for reconsideration of Order No. 5408 (Order No. 5414, Ap. 19).

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*These affidavits are included, inter alia, in the appendix filed by appellees, the Company and the Commission, and that appendix is referred to herein as Ap.

Thereafter TUA filed a petition of appeal in the United States District Court for the District of Columbia (C.A. No. 518-70) requesting that PSC Order Nos. 4887 and 4899 be rescinded and voided. On motions to dismiss filed by the Commission and the Company and the motion for judgment on the pleadings filed by TUA, the District Court found, upon consideration of the oral argument in open court by counsel for all parties, together with the pleadings and papers filed and a review of the entire record, that the findings of fact of the PSC in the orders at issue were not unreasonable, arbitrary or capricious and that there was no error of law. Accordingly, the court granted the motion of appellees' to dismiss and denied the motion of TUA for judgment on the pleadings (Ap. 20). Appellant thereafter filed an appeal from the Order of the District Court.

ARGUMENT

I

Preliminary Statement

This appeal by TUA is from an order of the United States District Court for the District of Columbia dismissing an appeal from orders of the Public Service Commission which, in the first instance, denied a motion made by TUA requesting the Commission, inter alia, to rescind orders entered in 1964 and 1965.

As may be seen from the statement of the case, appellant exhausted every avenue of appeal on the merits from a proceeding before the Public Service Commission of the District of Columbia which began in 1963, and ultimately resulted in a rate order which became effective on August 7, 1965.

There would be no point in expounding at length upon the long and protracted proceedings growing out of the Commission's authorization of a 6.25 per cent return on the Company's rate base which was the lowest return that could be permitted consistent with the evidence of record. Suffice it to say that appellant's claims of error, numbering over 40 items in the District Court, contained numerous frivolous allegations.

Notwithstanding that appellant thereafter in this court somewhat condensed its attack (from over 40 allegations of error in the District Court to six points on appeal in this court), it nevertheless, upon this court's affirmance of the District Court, filed a petition for writ of certiorari. In its petition for writ of certiorari, the appellant abandoned its attack on the merits of the rate orders which were the subject of consideration before the Commission, the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. Essentially, the questions it raised in the Supreme Court were whether TUA as an unsuccessful litigant was entitled to attorney's fees based upon alleged savings to the public in excess of over $8,000,000 (i.e., the difference between the Company's requested relief, and the relief afforded it by the Commission's orders) and an attempt to collaterally attack an order entered by the Commission in 1954. While the petition for writ of certiorari was pending before the Supreme Court, appellant, by motion to remand, for the first time alleged that the Chairman of the Public Service Commission should have been disqualified from participating in the decision of the Commission. The Supreme Court denied the motion to remand; the petition for

writ of certiorari and a subsequent request for rehearing.

II

There Is No Basis In Law Or Fact Which Would Justify Overturning The Order Of The District Court

Sections 43-704 through 43-710, inclusive, D. C. Code, 1967, provide a comprehensive and exclusive method for the review of final orders and decisions of the Public Service Commission. Briefly, Section 43-704 provides for an application for reconsideration in writing by anyone affected by any final order or decision of the Commission. Section 43-705 confers jurisdiction on the United States District Court for the District of Columbia to hear and determine any appeal from such order or decision; further provides that the appeal shall be heard upon the record before the Commission and that upon the conclusion of the hearing thereon, the court shall either dismiss the appeal and affirm the order of the Commission or sustain the appeal and vacate the Commission's order. This section further confers jurisdiction upon the United States Court of Appeals for the District of Columbia Circuit on appeal from the order or decree of the District Court. Thereafter, the Supreme Court of the United States may, upon a petition for certiorari granted in its discretion, review the said case.

Section 43-706 provides that in the determination of any appeal from an order of the Commission, the review by the Court shall be limited to questions of law and that the findings of fact by the Commission shall be conclusive unless it shall appear that such findings are unreasonable, arbitrary or capricious.

Section 43-710 confines the method of review of the orders and decisions of the Commission exclusively to that provided by Sections 43-704 to 43-709, D. C. Code, 1967.

Before the Commission, appellant's cited authority for the rescission action it requested in its motion to rescind was Section 43-702, D. C. Code, 1967. Assuming for purposes of argument, that the Public Service Commission in the present state of the record had authority under Section 43-702, D. C. Code, 1967 to rescind the orders complained of, such authority was, at best, contingent upon compliance with applicable provisions of that section. *

In its motion to remand before the Supreme Court and in its motion to rescind before the Commission, appellant took the position that employment of the Chairman's children by the Company and the fact that he could, and did, refer people to the Company for employment disqualified him from participating in the rate proceeding. The facts are undisputed and appear in the sworn affidavits submitted to the Supreme Court in connection with the motion to remand and to the Commission in connection with the subsequent motion to rescind. Details with respect to the children's employment are contained in the affidavits of Mr. Washington (Ap. 2-5) and Mrs. Alexander (Ap. 6-7) and the circumstances under which Mr. Washington referred prospective employees to the Company are set forth in his affidavit and that of Mr. Zahn (Ap. 8-11).

*Sec. 43-702 provides that the Commission may, after notice and opportunity to be heard, as provided in Sec. 43-410, rescind prior orders of the Commission. As a practical matter, the Commission is now engaged in full-scale hearings and investigation regarding the current level of earnings and level of rates of the Telephone Company in Formal Case No. 538 and TUA is an intervenor represented by Mr. Curtis.

A fair summary of the contents of the aforesaid affidavits could lead to the reasonable conclusion that the Company was in a competitive market to fill its large employment needs and that the treatment of the Chairman's children and his referrals was exactly the same as afforded any other applicant for employment with the Company.

Although the Supreme Court denied, without stating its reason, appellant's contentions in its motion to remand which were the same as those urged before the Commission on the motion to rescind, the Commission stated its reasons for the denial of the motion to rescind in no uncertain terms. One ground was that the attack on the 1964 and 1965 orders was dilatory. Sworn affidavits indicated that the movant was aware of the circumstances upon which it based its claim while the matter was still pending before the Commission. While the movant denied he had learned of the matter at that stage, the Commission nevertheless, found movant by its own admission, knew of it before the District Court had acted on these orders. The Commission also stated that it knew of no authority which would justify the relief sought "under the circumstances here presented". Finally, the Commission reviewed the orders complained of and found that they were a well-grounded and cogent disposition of the issues presented in the rate proceeding and went on to state that many of the issues were resolved contrary to the position taken by the Company; that the Company had received only a fraction of the increase it sought, and that the orders had been reviewed and upheld in the courts (Ap. 17-18).

A subsequent application for reconsideration of the foregoing order denying the motion to rescind was denied on the ground that it provided no substantive reasons for the Commission to reconsider its prior order.

Thereafter appellant filed an appeal in the United States District Court for the District of Columbia to review the aforesaid orders of the Commission (C.A. No. 518-70). The Court, upon consideration of the oral argument in open court by counsel for all parties, together with the pleadings and papers filed therein, and after a review of the entire record granted the motions of appellees to dismiss and denied the motion of appellant for judgment on the pleadings. In so doing, the District Court found and concluded, in accordance with the scheme of statutory review of Commission's orders more fully set forth above, that the findings of fact of the Public Service Commission were not unreasonable, arbitrary or capricious and that the orders did not contain errors of law.

CONCLUSION

The Public Service Commission properly denied the motion of appellant to rescind certain orders promulgated in 1964 and 1965. The District Court, after extensive review, found that the Commission did not err as a matter of law and its findings of fact were not unreasonable, arbitrary or capricious. Accordingly, for the reasons shown above, the

order of the District Court dismissing appellant's petition of appeal from orders of the Public Service Commission should be affirmed.

Respectfully submitted,

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